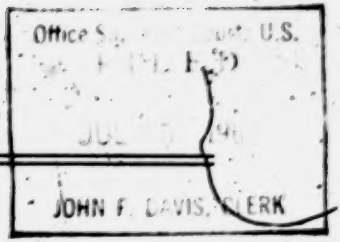
LIBRARY
SUPREME COURT, U. S.



IN THE

Supreme Court of the United States

October Term, 1962

No. 227

DAVID WASSERMANN,

Petitioner,

against

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, THIRD DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

JACOB RASSNER,
Counsel for Petitioner,
Office & P. O. Address,
15 Park Row,
New York 38, N. Y.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	3
Laws Involved	4
Statement	4
Reasons for Granting the Writ	9
Summary of the Argument	10
ARGUMENT:	
POINT I—This Court has repeatedly stated that it will not be foreclosed to make inquiry, irrespective of the State Court findings that constitutional questions were or were not raised or passed on	12
POINT II—Supreme Court makes its own inquiry as to facts of denial of due process	13
POINT III—Petitioner was denied the equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution. The failure to redress constitutes error	14
POINT IV—Petitioner has been deprived of a valuable property without due process of law	16
POINT V—Petitioner was deprived of due process in that he did not have a fair hearing	16
A. Adequate Notice	17
B. Impartial Tribunal	18
C. Petitioner Was Deprived of Due Process as His Hearing Was Not Held by a Competent Tribunal	20

PAGE

D. Petitioner Was Deprived of Due Process in That He Was Deprived of the Right of Confrontation and Cross-Examination 23

E. Petitioner's Right to Due Process Was Violated by an Industry Body of Unpaid Private Citizens Performing a Public and Judicial Function of Holding the Hearing Resulting in Revocation of His License 24

F. Petitioner Was Deprived of Due Process in That Acts Charged Against Petitioner Were Not Set Forth, Defined or Contained in Statutes Charged 26

G. Petitioner Was Deprived of Due Process in That He Was Found Guilty of Acts Not Charged Against Him 28

H. Petitioner Was Deprived of Due Process by the Finding of Guilt Based on Hearsay and Not Supported by Evidence of Probative Value 29

I. Petitioner is Deprived of Due Process in That Punitive or Penal and Disciplinary Status Was Enforced Against Him Retroactively and *Ex Post Facto* 29

J. Petitioner Was Deprived of Due Process by Respondent's Use of False Exhibit as Evidence, in Lieu of Original Exhibit 30

K. Due Process is Lacking Where, as Here, the One Who Decides Did Not Hear the Evidence 32

POINT VI—Petitioner has been deprived of due process, as due process requires that police power, penal and/or disciplinary statutes must be strictly construed 33

PAGE

POINT VII—Petitioner was deprived of due process in that lack of an adequate or intelligible standard in 2(a) and 2(g) renders them void and violative of due process 38

POINT VIII—Petitioner was deprived of due process in that the delegation of unfettered discretion to respondent in the pertinent provisions of § 6515 is contrary to constitutional requirements of due process and the subject provisions are, therefore, constitutionally void 40

POINT IX—Petitioner was deprived of due process in that Education Law § 211 is an unconstitutional delegation of unfettered discretion to the respondent to make an arbitrary determination, regardless of the evidence, and such provision is unconstitutional and void 42

POINT X—Petitioner was deprived of due process in that the respondent's Committee on Grievances was not properly constituted in accordance with the provisions of subdivisions 1 and 4 of § 6515, and these proceedings were, therefore, void, resulting in lack of due process in the revocation of petitioner's license 43

POINT XI—Petitioner's constitutional rights were violated when he was compelled to testify against himself and was deprived of the aid of counsel 47

He Was Not Informed That He Was a Prospective Defendant 47

POINT XII—Respondent's sub-committee found petitioner guilty on inconsistent and conflicting findings of fact which establish innocence, not guilt 48

CONCLUSION 49

Cases Cited

	PAGE
Aero Design v. Oklahoma, 151 F. Supp. 844, affirmed 353 U. S. 943, 77 S. Ct. 824	49
Bender v. Board of Regents, 262 A. D. 627, 30 N. Y. S. 2d 779	16, 18, 19
Carter v. Carter Coal Company, 298 U. S. 238, 56 S. Ct. 855	20, 26, 49
Cella v. U. S., 208 F. 2d 783, cert. den. 347 U. S. 1016, 74 S. Ct. 864	49
Chicago, etc. v. Chicago, 166 U. S. 226	39
Connally v. General Construction Company, 269 U. S. 385, 46 S. Ct. 126	34
Cosmopolitan v. Feuchtwanger, 226 N. Y. S. 2d 584	29
Dejonge v. State of Oregon, 299 U. S. 353, 57 S. Ct. 255	28
Donegan, In re, 282 N. Y. 285	33, 37, 45
Epstein, Application of, 267 A. D. 27, 44 N. Y. S. 2d 921	19
Fay v. State of New York, 332 U. S. 261, 67 S. Ct. 1613	14
Fink v. Cole, 302 N. Y. 216	25, 39
Genova v. Board of Regents, 272 A. D. 1085, 74 N. Y. S. 2d 729	15n
Gooch v. U. S., 297 U. S. 124, 56 S. Ct. 395	37
Hecht v. Monaghan, 307 N. Y. 461	18, 20, 21
Hilfer v. Board of Regents, 283 N. Y. 304	16, 34, 36, 44, 45
Honeyman v. Hanan, 300 U. S. 14, 57 S. Ct. 350, 81 L. Ed. 476	12
Hopt v. Utah, 110 U. S. 574	30
Inland Steel Co. v. National Labor Relations Board, 109 F. 2d 9	21
Irvin v. Dowd, 359 U. S. 394, 79 S. Ct. 825	15

PAGE

Jordan v. Massachusetts, 225 U. S. 167, 32 S. Ct. 651 21
Julien J. Studley v. Geisenger, 12 Misc. 2d 527, 177 N. Y. S. 2d 776, affirmed 7 A. D. 2d 844, 182 N. Y. S. 2d 326 38
Juno Operating Corp. v. New York City Police Department, 199 N. Y. S. 2d 267 ..... 15n

Lanza v. State of New York, 82 S. Ct. 1218 12
Lanzetta v. New Jersey, 306 U. S. 451, 59 S. Ct. 618 ..... 28, 34, 35, 37, 39, 40
Lewis v. Johnson, 16 F. 2d 180 32
Lloyd, etc. v. Elting, 287 U. S. 329, 53 S. Ct. 167 ..... 31, 32

Marburg v. Cole, 286 N. Y. 202 33
Morgan v. U. S., 298 U. S. 468, 56 S. Ct. 906 ..... 21, 32
Morhous v. Supreme Court of New York, 293 N. Y. 131 15

Neal v. Delaware, 103 U. S. 370 ..... 15n

O'Dea's Bar & Restaurant, Inc. v. New York State Liquor Authority, 201 N. Y. S. 2d 340 ..... 32, 33
Olsen v. Olsen, 27 Misc. 2d 555, 209 N. Y. S. 2d 503 .. 38

Packer Collegiate Institute v. University of State of New York, 298 N. Y. 184 ..... 39, 42
Panama Refining Co. v. Ryan, 293 U. S. 388, 55 S. Ct. 241 39
People v. Bene, 288 N. Y. 318 ..... 34, 37
People v. Grundstein, 245 N. Y. S. 523 45
People v. Glubo, 5 N. Y. 2d 461, 186 N. Y. S. 2d 26 ... 38
People v. Kendricks, 300 N. Y. 544 23
People v. Kightlinger, 89 N. Y. S. 2d 755, modified 93 N. Y. S. 2d 636, affirmed without opinion, 301 N. Y. 639 ..... 37, 45
People v. Levy, 128 N. Y. S. 2d 275, 283 A. D. 383 .... 34, 37
People v. Shapiro, 4 N. Y. 2d 597, 176 N. Y. S. 2d 632 ..... 38, 45

PAGE

Pierre v. State of Louisiana, 306 U. S. 354, 59 S. Ct. 536 ..... 13, 14
Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55 48
Ray v. Board of Regents, 9 A. D. 2d 560, 189 N. Y. S. 2d 299 ..... 15n
Schechter Poultry Corp. v. U. S., 295 U. S. 495, 55 S. Ct. 837 ..... 26, 39, 43
Sims v. U. S., 252 F. 2d 434, affirmed 359 U. S. 108, 79 S. Ct. 641 14
Small v. Moss, 279 N. Y. 288 ..... 39, 42
Smigel v. Board of Regents, 15 A. D. 2d 623, 222 N. Y. S. 2d 457 ..... 15n
Snyder v. Massachusetts, 291 U. S. 97, 54 S. Ct. 330 23
Stammer v. Board of Regents, 262 A. D. 372, 29 N. Y. S. 2d 38 21
Stuart v. Palmer, 74 N. Y. 183 43
Titus v. Wallick, 306 U. S. 282, 59 S. Ct. 557 13
Tompkins v. Board of Regents, 299 N. Y. 469 ..... 15n
Truax v. Corrigan, 257 U. S. 312 49
Tumey v. Ohio, 273 U. S. 510 20
U. S. v. Eaton, 144 U. S. 677, 27 S. Ct. 764 ..... 27, 39

Laws

Constitution of U. S.—Amendment 14 ..... 3, 14
Constitution of U. S.—Amendment 14, § 1 4
28 U. S. C. 1257(3) 2
Civil Practice Act of the State of N. Y. Article 78 7
N. Y. State Education Law, § 211 ..... 3, 4, 42
N. Y. State Education Law, § 6501, subd. 4 ..... 4, 26, 35, 39
N. Y. State Education Law, § 6514 ..... 9, 22, 24, 43
N. Y. State Education Law, § 6514 2(a) 4, 6, 10, 26, 27, 35, 36, 37, 38, 39, 40
N. Y. State Education Law, § 6514 2(g) 4, 6, 10, 12, 26, 27, 29, 30, 35, 36, 37, 38, 39, 40
N. Y. State Education Law, § 6515 ..... 2, 4, 9, 10, 22, 24, 25, 40, 41, 42, 43, 44, 45, 46

IN THE

Supreme Court of the United States

October Term, 1962

No.

DAVID WASSERMANN,

Petitioner,

against

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, THIRD DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

To the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to the Appellate Division, Third Department, of the Supreme Court of the State of New York to review the judgment of the New York State Court of Appeals, entered in the above entitled case on April 5, 1962, and the said Appellate Division's order, entered May 16, 1962, which made the said Court of Appeals judgment the order of the said Appellate Division.

Opinions Below

The opinion of the Court of Appeals of the State of New York is unreported as yet. It is set forth herein in the appendix, at page 1a.

The opinion of the Appellate Division, Third Department, of the Supreme Court of the State of New York is reported at 13 App. Div. 2d 591, 212 N. Y. Supp. 2d 884, and is set forth in the appendix, at page 7a.

The report and findings of the Subcommittee on Grievances of the Department of Education of the State of New York is unreported officially and is set forth herein in the appendix at page 16a.

The report of the Committee on Grievances of the Department of Education of the State of New York is unreported officially and is set forth herein in the appendix at page 13a.

The report of the Regents' Committee on Discipline of the Department of Education of the State of New York is unreported officially and is set forth in the appendix at page 10a.

The vote of the Regents is set forth in the appendix at page 9a.

Jurisdiction

The judgment of the Court of Appeals of the State of New York was dated and entered April 5, 1962, and the order of the Appellate Division, Third Department, of the Supreme Court of the State of New York, adopting the said judgment of the Court of Appeals, was entered May 16, 1962.

Jurisdiction of this Court to review the above mentioned judgment and order by writ of certiorari is based on 28 U. S. C. 1257 (3).

The request is made that a writ of certiorari issue to the said Appellate Division, Third Department, of the Supreme Court of the State of New York instead of to the Court of Appeals of the State of New York for the reason that the record herein was remitted by the Court of Appeals to the said Appellate Division, which said Appellate Division now has possession of the record herein.

Questions Presented

1. Was the Constitution of the United States, Amendment 14, violated and petitioner deprived of due process and denied equal protection of the law, by reason of the following:

(a) That his license to practice medicine was revoked on provisions of New York State Education Law, § 6515, and Sec. 211 which petitioner contends are invalid by reason of the fact that they are repugnant to the Constitution of the United States, in that a procedure is authorized which deprives a citizen, a holder of a medical license, of due process of law and a fair hearing.

(b) In that said sections authorize an administrative body to hold hearings, to decide charges against a doctor and revoke his license or otherwise penalize him, unrestrained by any standard of legal requirement, thus constituting conjecture, inference and hearsay as a valid basis for sustaining charges of conspiracy and fraud in the practice of medicine.

(c) Section 6515 authorizes accusers who are without any legal training, to set up their own forum and rules of procedure and pass upon the validity and admissibility of evidence, contrary to basic rules of pleading and practice.

(d) Section 6515 authorizes an industry body of private citizens, unfamiliar with the weight, sufficiency and admissibility of evidence to perform a legal, judicial and public function for which they were untrained and legally incompetent.

(e) Section 6515 authorizes a lay industry body of doctors to render judgment constituting a finding of "conspiracy and fraud in the practice of medicine" without hearing any of the evidence and without opportunity of legal representation on behalf of the doctor, as to the legal

import of the alleged evidence adduced and without any indication that the record was actually read by the administrators who made the final decision.

(f) Section 6515 grants to an administrative lay industry body unlimited power to disbar a doctor from practicing medicine, without any standard, statute or legal limitations, thus allowing vague, indefinite, unsupported charges, based on hearsay, to be accepted as legally sufficient to deprive a doctor of his license to practice medicine.

(g) Section 6515 authorizes a lay industry body, sitting in a forum of their own choosing, both as the accusers as well as the judges, to invoke statutes, retroactively, as a legal basis for revoking petitioner's license to practice medicine, based on acts never theretofore so classified by any court or medical association.

Laws Involved

1. Section 1 of Amendment 14 to the United States Constitution (appendix 22a).

2. New York State Education Law, Section 211 (Appendix 22a).

3. New York State Education Law, Section 6501 4 (Appendix 23a).

(4) New York State Education Law, Section 6514 2(a) (appendix 24a).

(5) New York State Education Law, Section 6514 2(g) (appendix 24a).

(6) New York State Education Law, Section 6515 (appendix 24a).

Statement

Petitioner's license to practice medicine was revoked on the finding by the subcommittee of the Board of Regents of the State of New York that petitioner had signed exaggerated bills and reports prepared by a lawyer, I. Frank Miller, since convicted of forgery (R. 193).

Petitioner's credibility was erroneously and improperly discredited by the improper introduction of a typewritten document offered as a false exhibit (Exh. D, R. 154) to prove that petitioner had falsified his testimony when he stated he did not have secretarial services.

The retraction was made by the Board of Regents after petitioner had been seriously prejudiced.

February 10, 1961

Hon. Francis Bergan
Presiding Justice
Appellate Division, Third Department
Albany, New York

Re: Wassermann v. The Board of Regents.
January Term, 1961, No. 2945

Dear Judge Bergan:

I have learned today that Exhibit D handed up at the time of oral argument in the above-entitled proceeding is not the exhibit introduced by petitioner at the original hearing of this matter but is a typewritten copy as prepared by the hearing stenographer who lost the original exhibit after it had been read into the minutes (fols. 462-464). I am advised that the stenographer himself typed up the copy which he marked Exhibit D in evidence.

When the matter was assigned to me at this office, I found Exhibit D in the form as handed up to the Court. Part of my advocacy on behalf of the respondent in our brief was based upon the fact that Exhibit D was typed rather than handwritten. In all fairness to petitioner and to the Court, I respectfully request that references on pages 8 and 10 of our brief to Exhibit D as a typewritten document be disregarded. I wish to urge here that Exhibit D at the time of the original hearing was, in fact, handwritten by petitioner.

Very truly yours,

LOUIS J. LEFKOWITZ
Attorney General
By ROBERT W. BUSH
ROBERT W. BUSH
Assistant Attorney General

cc Hon. William H. Coon
Hon. James Gibson
Hon. J. Clarence Herlihy
Hon. Walter B. Reynolds
Angelo A. Tumminelli, Esq.
BUSH:jnl

On October 31, 1960, petitioner's license to practice medicine in the State of New York was revoked by the respondent after a hearing was held by a Subcommittee of the Grievance Committee of the Board of Regents of the Department of Education of the State of New York, on charges preferred by an employee of the said Department of Education (R. 206).

The hearing was held on charges that petitioner was guilty of fraud or deceit in the practice of medicine in violation of Education Law, Section 6514 2(a), and petitioner was also charged with conspiracy in violation of Education Law, Section 6514 2(g) (R. 44).

Under 2(a), petitioner was charged with "submitting" false bills and reports to an attorney relating to medical services performed for the said attorney's clients (First specification of the charges) (R. 44).

Under 2(g), petitioner was charged with entering into an illegal conspiracy with said attorney wherein the petitioner would allegedly "furnish" the said attorney with false, fraudulent and exaggerated medical bills and medical reports for the said attorney's clients (Second specification of the charges) (R. 48).

The Subcommittee of the Grievance Committee, which held the hearing, found that petitioner was guilty of "issuing" false medical bills and reports and that he was guilty of fraud or deceit in the practice of medicine under said subdivision 2(a) and guilty of entering into an illegal conspiracy with the said attorney and was therefore guilty of unprofessional conduct in the practice of medicine under subdivision 2(g) (R. 189).

The Subcommittee thereupon recommended that:

> "In view of the gravity of the charges against the respondent and the proof adduced in support thereof, we feel that the respondent is not fit to be entrusted with the responsibilities, duties and obligations of a practicing physician to the public" (R. 194).

The nine member Grievance Committee thereupon recommended revocation of practitioner's license in its report dated May 5, 1960 (R. 196).

Thereafter, on September 13, 1960, the report of the Regents' Committee on Discipline recommended the revocation of petitioner's license, as a result of which the Regents' Committee, on September 30, 1960, voted to comply with the recommendation of revocation (R. 203, f. 609).

On October 31, 1960, an order was made revoking practitioner's license to practice medicine in the State of New York (R. 206).

On November 15, 1960, an order to show cause was made by a Justice of the Supreme Court for the Appellate Division, Third Department, staying the order of revocation of petitioner's license and bringing on to be heard before the said court a petition for judicial review of respondent's proceedings, pursuant to the provisions of Article 78 of the Civil Practice Act of the State of New York (R. 3-19).

On this review, the said Appellate Division confirmed respondent's order of revocation in its order entered July 10, 1961 (opinion herein, appendix, p. 7a) (R. 214-216).

The said Appellate Division thereafter denied leave to appeal to the Court of Appeals.

Leave to appeal to the Court of Appeals was thereafter granted by the Court of Appeals in its order dated January 18, 1962, which order also stayed respondent's order of revocation, pending the final determination of the said appeal (R. 220-221).

The Court of Appeals thereafter affirmed the Appellate Division in its order dated and entered April 5, 1962, which order remitted the record herein to the said Appellate Division (48a).

On May 16, 1962, the said Appellate Division entered its order adopting the judgment of the Court of Appeals as its own order (58a).

The record herein now being in the possession of the said Appellate Division, petitioner thereupon instituted this petition for writ of certiorari to the said Appellate Division to review the judgment and order of the Court of Appeals of the State of New York.

The Federal question as to denial of petitioner's constitutional rights was first raised in petitioner's petition to the Appellate Division (R., 15, fol. 44, et seq.). The Court failed to pass upon the constitutional questions raised, except indirectly by confirming respondent's order of revocation (see opinion, R. pp. 217-219, appendix, p. 7a).

The Federal question of unconstitutionality was thereafter again raised by petitioner in his motion to the Court of Appeals for leave to appeal thereto (see motion for leave to appeal to the Court of Appeals) p. 8 subpars. (a) and (d) (appendix, pp. 35a-36a); p. 9, subpar. III, subpar. 6 (appendix, pp. 36a-37a); p. 10, subpar. 7 (appendix, p. 37a); p. 19, paragraph in midpage (appendix, p. 41a); p. 20, last paragraph thereof (appendix, p. 41a); p. 22, headnote thereon (appendix, p. 42a); p. 23, first paragraph thereof (appendix, p. 42a); p. 24, Point I, Headnote (appendix, p. 43a); p. 27, Point II, Headnote (appendix, p. 43a); p. 28, next to last paragraph (appendix, p. 43a); p. 29, last paragraph (appendix, p. 43a); p. 30, last paragraph (appendix, p. 43a); p. 34, bottom of paragraph (appendix, p. 44a); p. 35, bottom of page (appendix, p. 44a); p. 39, paragraph preceding Point V (appendix, p. 44a).

The Court of Appeals granted the said motion for leave to appeal to it on the aforesaid questions raised (R. 220).

The Federal questions were then presented in the Court of Appeals as follows: Petitioner's brief, Points II, III and IV, pp. 26-28 (appendix, pp. 45a-47a).

The Court of Appeals, in its opinion (appendix, p. 1a), failed to comment on the constitutional questions raised by petitioner and apparently disposed of the Federal questions with the following statement:

> "We have considered carefully the other issues raised by appellants and find them to be without merit." (6a)

Reasons for Granting the Writ

The Court of Appeals of the State of New York has decided federal questions of substance not heretofore decided by this Court, and has decided them in a way not in accordance with the applicable decisions of this Court.

Moreover, the respondent has pending, before it, proceedings of like nature against approximately 1500 doctors, similarly accused of "unprofessional conduct", etc., who will be subjected to the same type of hearing under the same provisions of statute as are the subject of review herein, *i.e.*, Education Law, Sections 6514 and 6515 (see appendix, pp. 24a-25a).

Obviously, therefore, it is of far greater importance that respondent's procedures, and the authorizing statutes, be reviewed for constitutional defects and violations when the licenses of 1500 doctors are involved in the adjudication thereof than if petitioner alone were so involved.

As is demonstrated by the glaring headlines of the newspaper articles set out in the appendix, following 60a, petitioner was one of the first of the doctors to be proceeded against in a wave of public passion and hysteria, resulting in a mass "witch hunt", with all the attendant lack of due process usually found in such an atmosphere.

Summary of the Argument

Subdivisions 2(a) and 2(g) of Education Law Section 6514, being penal and punitive statutes promulgated in the exercise of the police power, do not define what acts constitute violations of their provisions, do not adyise or inform those whose conduct is to be controlled what acts are prohibited, and the said subdivisions are constitutionally defective for failure to contain definite standards and for delegation to the administrative agency charged with their enforcement of an unfettered and unbridled discretion to legislate the standards of conduct.

Section 6515 of the Education Law is unconstitutionally defective in that it provides for delegation of a public function (that of holding hearings as a judicial or quasi-judicial body, making findings of fact, deciding questions of law, admitting and/or rejecting evidence, evaluating the credibility of witnesses and weighing the evidence) to a private industry body of unpaid doctors not trained or competent to perform the said judicial functions, and the said Section 6515 permits the revocation of licenses to practice medicine by such an incompetent tribunal on hearsay evidence without requiring any quantum of probative evidence to support the revocation.

Due process, therefore, is lacking, not only in what *was* done herein under the statute, but in what *may* be done under the statute.

Petitioner was denied the equal protection of the laws in that the courts of the State of New York denied him a remedy which was available to him and in that he received a far more severe penalty than was meted out to others found guilty of violating the same provisions, even to the extent that the other said violations were of a far more serious nature.

Petitioner was denied due process in that he was found guilty without probative evidence of any quantity to sup-

port the finding; the presentation of hearsay comments and its reception by the hearing committee as evidence prevented him from confronting witnesses against him and deprived him of the opportunity of cross-examination.

The respondent utilized and submitted a false typed exhibit to the Appellate Division, arguing that it destroyed petitioner's credibility and contention that he had no secretarial services available, thereby deceiving the Court and resulting in denial of due process to petitioner. An explanatory letter was later submitted to the Appellate Division, *after* the matter was heard and argued. The explanation established that the original exhibit was, in fact, a handwritten document which had been lost by the hearing stenographer, who thereupon typed up a copy from the hearing minutes. The probability is great that it was this false typed exhibit which was considered by the hearing sub-committee and the 9 man grievance committee when it studied the evidence and arrived at its determination. The probability is also great that any subsequent review by the Regents' Committee on Discipline and the Regents Committee itself had only this false typed exhibit rather than the original handwritten document.

The reviews, therefore, at the various administrative levels were based in part on this false evidence, no explanation or admission of which was made until *after* the matter was heard by the Appellate Division.

Petitioner was deprived of due process in that the decision to revoke petitioner's license was made by the administrators who did not hear the evidence without it appearing that such decision was made on their own study of the evidence.

Petitioner was deprived of due process in that the administrators were authorized to decide the charges in their discretion without any standard having been set for the exercise of their discretion, thereby permitting an unlimited arbitrary exercise of power.

Petitioner was deprived of due process in that the administrators were authorized to, and did, find petitioner guilty of acts not charged against him.

Petitioner was deprived of due process in that he was charged with, and found guilty of, acts not set forth in the statutes he was charged with violating, and which acts are not within the contemplation of the said statutes.

Petitioner was deprived of due process in that subdivision 2(g) of Section 6514 was enforced against him retroactively.

ARGUMENT

POINT I

This Court has repeatedly stated that it will not be foreclosed to make inquiry, irrespective of the State Court findings that constitutional questions were or were not raised or passed on.

In the case of *Lanza* v. *State of New York*, decided June 4, 1962, 82 S. Ct. 1218, the Court held in footnote 3, page 1226, quoting from the case of *Honeyman* v. *Hanan*, 300 U. S. 14, 18-19, 57 S. Ct. 350, 352, 81 L. Ed. 476:

> "'A certificate or statement by the state court that a federal question has been presented to it and necessarily passed upon is not controlling. While such a certificate or statement may aid this Court in the examination of the record, it cannot avail to foreclose the inquiry which it is our duty to make or to import into the record a federal question which otherwise the record wholly fails to present.' Indeed, as Honeyman v. Hanan, supra, and Honeyman v. Hanan, 302 U. S. 375, 58 S. Ct. 273; 82 L. Ed. 312, illustrate, proper pursuit of the matter when suspicions are aroused may disclose that a state court's certificate simply did not mean what it appeared, at first glance, to say."

The Federal questions raised herein were properly presented to the Court below, as set forth herein, *supra*, pp. 6-7.

Both the Court of Appeals and the Appellate Division declined to recognize, in their respective opinions (appendix, p. 1a; p. 7a), the Federal questions raised. Their respective decisions, however, establish that their determinations in respect to the Federal questions raised were adverse to petitioner.

Petitioner moved to amend the Court of Appeals remittitur to include the statement that Constitutional questions were raised on the appeal and passed upon, etc., which motion was denied by an order dated May 10th, 1962.

The sufficiency of the grounds of denial of Federal rights are for this Court to decide. *Titus* v. *Wallick*, 306 U. S. 282, 291, 59 S. Ct. 557, 562.

In *Titus, supra*, the court said:

> "* * * sufficiency of grounds of denial [of Federal right] are for this Court to decide."

POINT II

Supreme Court makes its own inquiry as to facts of denial of due process.

Despite the denial by the court below of petitioner's claims of violation of due process, this Court has said that it will make its own independent inquiry as to the facts of denial of due process, when the claim is properly asserted. *Pierre* v. *State of Louisiana*, 306 U. S. 354, 358, 59 S. Ct. 536, 539.

In *Pierre, supra*, this Court said:

> "Yet, when a claim is properly asserted— * * * it becomes our solemn duty to make independent in-

quiry and determination of the disputed facts—for equal protection to all is the basic principal upon which justice under law rests."

In *Fay v. State of New York*, 332 U. S. 261, 67 S. Ct. 1613, this Court said at p. 272 of 32 U. S. (p. 1620 of 67 S. Ct.):

> "It is to be regretted that we must deal with questions of fact without aid of findings by the courts whose experience * * * would entitle their findings to very great weight. We would, in any case, be obliged on a constitutional question to reach our own conclusions, after full allowance of weight to findings of the state courts, and in this case must examine the evidence."

And this Court affirmed what was said by the Fourth Circuit in *Sims v. U. S.*, 252 F. 2nd 434, 438, affirmed 359 U. S. 108, 79 S. Ct. 641:

> "Administrative interpretations are not absolute rules of law which must necessarily be followed in every evidence, but are only helpful guides to aid courts in their task of statutory instructions."

POINT III

Petitioner was denied the equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution. The failure to redress constitutes error.

The denial of the equal protection of the laws rests as well upon the inequality and severity of the discipline meted out to petitioner by respondent, as measured against noticeably more lenient discipline meted out by respondent to other professional license holders under its supervision for offenses which were far more reprehensible than the acts allegedly committed by petitioner, as demonstrated by

a review of other cases where respondent herein had proceeded against licensees.*

The New York State Court of Appeals in *Morhous v. Supreme Court of New York*, 293 N. Y. 131, supported this contention when it held, at p. 134:

> "The mandate of the Constitution of the United States that no state shall deprive a person of his liberty without due process of law is unheeded by a state only where it has denied to its courts jurisdiction to inquire whether 'through its legislature, through its courts, or through its executive officers' a person has been wrongfully deprived of his liability, or where the court having 'jurisdiction to redress the prohibited wrong,' fails to accord to the injured person the remedy to which he is entitled."

In *Irvin* v. *Dowd*, 359 U. S. 394, 404, 79 S. Ct. 825, 831, this Court quoted the following statement with approval:

> "'the state courts, equally with the courts of the Union, * * * [have an obligation] to guard, enforce, and protect every right granted or secured by the Constitution of the United States * * *.' Robb v. Connolly, 111 U. S. 624, 637, 4 S. Ct. 544, 551, 28 L. Ed. 542."

---

* Doctors convicted of crimes involving such offenses as prescribing narcotic drugs in violation of the Public Health Law: *Kay* v. *Board of Regents*, 9 A. D. 2d 560, 189 N. Y. S. 2d 299, 300-301—suspension of license for six months ordered by respondent; *Siegel* v. *Board of Regents*, 15 A. D. 2d 623, 222 N. Y. S. 2d 457—the respondent suspended for six months the license of a dentist on charges of submitting false affidavits of dental services; *Tompkins* v. *Board of Regents*, 299 N. Y. 469, 472—respondent suspended the medical license therein involved for six months for illegally prescribing narcotic drugs; *Genova* v. *Board of Regents*, 272 A. D. 1085, 74 N. Y. S. 2d 729, 730—respondent suspended the medical license therein involved for one year for criminal abortion.

The inequality of treatment based on variation in sentences is denial of the equal protection of the laws. *Neal* v. *Delaware*, 103 U. S. 370.

POINT IV

Petitioner has been deprived of a valuable property without due process of law.

It has been authoritatively held by a New York State court that the right to practice any profession is a valuable property right. *Bender* v. *Board of Regents*, 262 App. Div. 627, 30 N. Y. Supp. 2d 779, 784 (Supreme Court, Appellate Division, Third Department, 1941).

In *Hilfer* v. *Board of Regents*, 283 N. Y. 304, 308, the New York State Court of Appeals said, in respect to the license to practice medicine:

> "Such a license is a valuable right which has been give statutory protection."

It is respectfully submitted that it is well settled and fundamental law that the license also has the protection of constitutional requirements of due process.

POINT V

Petitioner was deprived of due process in that he did not have a fair hearing.

Due process was lacking in revoking petitioner's license. He was not given a fair hearing.

It is implicit within the requirements of a fair hearing that it be held before an impartial tribunal; with reasonable and adequate notice of the charges; with the right to confrontation of witnesses and cross-examination of the evidence.

Further, the hearing was not a fair hearing and due process was lacking as petitioner was found guilty of acts other than those charged against him. There is no provision made in the statute for the charges that have been

made against him. The tribunal was incompetent to perform the judicial functions assigned to it. The tribunal was composed of an industry-wide body of unpaid doctors performing a public and judicial function. The finding of guilt was not supported by any probative evidence. It is not supported by sufficient probative evidence.

A punitive or penal disciplinary statute was enforced retroactively and ex post facto. The administrator who made the final decision did not hear or review the evidence.

The elements of a fair hearing were lacking. Petitioner has, in fact, been deprived of a fair hearing and, therefore, has been deprived of due process in the revocation of his license.

A. Adequate Notice.

Adequate notice is a pre-requisite to a fair hearing. It pre-supposes that the accused will be given notice of the charges which he is to defend against. It clearly is not adequate notice, within the requirements of due process, if he is charged with one act and is found guilty of some other act, for, although he has been given notice of the act which is charged, he has obviously not been given notice of the act of which he is found guilty.

In the case at bar, it will be noted that the specification of the charges (R. 44, f. 131) charged that petitioner "submitted" bills and medical reports to an attorney, I. Frank Miller, and that said bills and medical reports were false and fraudulent (R. 45, f. 133).

On this charge, the finding of guilt was that petitioner had "issued" such bills and reports (R. 190, f. 570).

There is a substantial distinction between "submit" and "issue." In explanation, it would appear that anyone would be in a position to "submit" medical reports, whereas specific authority would be required to enable one to "issue" medical reports.

The reports herein involved were medical reports. Although no particular authority is required to "submit" a medical report to anyone, it is obvious that only one in possession of a valid license to practice medicine could "issue" a medical report.

Further, the act of "issuing" involves preparation of the report, while "submitting" does not. There is no evidence in the record, nor is there any evidence on which to base an inference, that petitioner prepared the subject reports. See Subcommittee's finding that the attorney "prepared" the subject reports (R. 193, f. 579).

Petitioner was given notice that he had to defend on the charge of "submitting" reports to an attorney, I. Frank Miller, but he was not given notice that he had to defend on the charge of "issuing" false reports.

Thus, it may be said in this case, as it was said by the Court in *Bender* v. *Board of Regents*, 262 A. D. 627, 30 N. Y. S. 2nd 779, at page 783, the complaint he was required to answer did not apprise him of the charges that were proved.

Similarly, in *Hecht* v. *Monaghan*, 307 N. Y. 461, 474, where the petitioner therein was found guilty of acts not charged against him, the Court said:

> "* * * But that was not the ground of which the petitioner had been informed and it is the complaint which defines and limits the charge and the license may not suspended or revoked for some reason or upon some ground other than that specified in the charge, as was done here."

B. Impartial Tribunal.

Lacking also is the requirement that the tribunal be an impartial one. The New York State courts have repeatedly characterized respondent's tribunal as being a prejudiced forum. In *Bender* v. *Board of Regents*, 262 A. D. 627, 30 N. Y. S. 2nd 779, 784, the Court characterized respondent's

tribunal, in a similar situation, as "a friendly forum of its own selection." The Court further said, at page 785, that:

> "While a proceeding * * * to revoke a license * * * is administrative rather than judicial, and need not be conducted with the exactness, formality or technicality required before a judicial tribunal, nevertheless the holder of a license cannot be deprived of it without due process of law; or in other words, without due notice and a full opportunity to be heard before an impartial tribunal, nor without clear and convincing proof of his guilt.
>
> The proof in the record before us does not meet those tests * * *."

In *Application of Epstein*, 267 A. D. 27, 44 N. Y. S. 2nd 921, 922, the Court said:

> "Generally speaking, in quasi-judicial proceedings before administrative agencies, where the same agency is both the prosecutor and judge, with the resultant tendency to predetermine, practically the only shield left open to the accused is his right of cross examination. Deprived of this, he stands defenseless before a tribunal predisposed to conviction."

In *Epstein, supra*, the tribunal so characterized is respondent's tribunal holding a hearing in the revocation of a physician's license, as in the case at bar.

Respondent's tribunal is obviously therefore, a forum, characterized by the courts of New York State as respondent's friendly forum, where it is both accuser and judge, predisposed to conviction and, therefore, does not meet the requirements of due process that the hearing be held before an impartial forum. It is thus established beyond cavil that respondent's forum is, in fact, a prejudiced forum.

In *Bender, supra*, the Court specifically held that:

> "The procedure invoked against petitioner in the cause before us violates the essentials of a sound judicial proceeding." (p. 784 at 30 N. Y. S. 2d.)

Further evidence of lack of impartiality is found in the colloquy between respondent's committee chairman, Dr. Boland, and petitioner's then attorney, which took place at the termination of the subject hearing (R. 182, f. 546 *et seq.*).

This colloquy demonstrates that Dr. Boland, himself apparently a practicing physician, was concerning himself with the percentage of petitioner's work in his specialty, which was obviously no part of the subject matter before the sub-committee.

This serves to demonstrate the point of view expressed in this Court's disapproval of the use of a private industry body to perform a public function with respect to its own industry on the ground that competitive or professional prejudice may supervene. (*Carter* v. *Carter Coal Company*, 298 U. S. 238, 311, 56 S. Ct. 855, 873).

See also *Tumey* v. *Ohio*, 273 U. S. 510, at pp. 522 and 535, re the judge being a member of the class or group involved in the hearing before him.

C. Petitioner Was Deprived of Due Process as His Hearing Was Not Held by a Competent Tribunal.

In holding the subject hearing, respondent's subcommittee was acting in a judicial, or at least quasi judicial, capacity.

In this regard, the New York State Court of Appeals in the case of *Hecht* v. *Monaghan*, 307 N. Y. 461, 469 said:

> "Revocation of a license—even where the same rests within the discretion of an administrative official—is not a legislative act. Mandell v. Board of Regents of University of State of New York, 250 N. Y. 173, 177, 164 N. E. 895, 897, where, as in the present case, the statute empowers the agency to revoke a license * * *, then the administrative act is of a judicial nature since it depends upon the ascertainment of the existence of certain past or present facts upon which a decision is to be made and rights and liabilities determined. It is clearly not a merely ad-

> ministrative act concerned with the internal funtioning of the agency itself, but it is a judicial or quasi judicial function of the administrative body."

Similarly, in respect to this respondent's subcommittee holding a hearing on charges against another physician, the Appellate Division of the New York State Supreme Court said:

> "This subcommittee had the duty to conduct the hearing and weigh the testimony in a manner that should have been at least quasi judicial." *Stammer* v. *Board of Regents*, 262 A. D. 372, 29 N. Y. S. 2d 38, 39.

In *Morgan* v. *United States*, 298 U. S. 468, 480, 56 S. Ct. 906, 911, this Court said in respect to an administrative hearing:

> "A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding hence it is frequently described as a proceeding of a quasi judicial character. The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts".

The authorities are abundant and clear that respondent's hearing is a judicial, or at least a quasi-judicial, hearing and that petitioner, as the accused participating in such a hearing, is entitled under due process to a tribunal mentally competent to conduct such a hearing.

In *Inland Steel Co.* v. *National Labor Relations Board*, 109 F. 2d 9, 20, the Seventh Circuit said, quoting this Court from *Jordan* v. *Massachusetts*, 225 U. S. 167, 176, 32 S. Ct. 651, 652:

> "Due process implies a tribunal both impartial and mentally competent to afford a hearing. * * *"

Examination of the facts in regard to the mental competency of respondent's subcommittee to hold and conduct a judicial or quasi-judicial hearing establishes the following circumstances.

New York Education Law § 6515, as it read at the time of the proceedings against petitioner herein, provided for the procedure to be followed in disciplinary proceedings against physicians. It provided, in subdivision 1, for a committee on grievances to be composed of ten members to be appointed by the Regents. It provided, in subdivision 2, that the members of the Grievance Committee should be nominated by specified medical or osteopathic societies having a specified number of members and that the Regents were to appoint, from such nominees, four members nominated by the Medical Society of the State of New York, two members by the New York State Homeopathic Society, one member by the New York State Osteopathic Society, and three members of conspicuous professional standing were to be on the Regents' own nomination. Members of the committee were required to be duly licensed physicians of the State. Subdivision 4 delegated to this Committee jurisdiction to hear all charges against duly licensed physicians for violation of the provisions of § 6514 (except subdivision 1, not relevant hereto).

Subdivision 4 further authorized the Chairman of the Committee to designate a subcommittee of three or more members to hear charges that are preferred against any licensed physician, such subcommittee to hear and report upon the charges to the full Committee.

Subdivision 5 provided that the Committee on Grievances shall not be bound by the laws of evidence in the conduct of its proceedings, but the determination shall be founded upon "sufficient legal evidence to sustain the same".

Clearly, therefore, the Grievance Committee, or its sub-committee holding a hearing, is authorized and required to sit in a judicial or quasi-judicial capacity to receive, admit or reject evidence offered, to determine questions of law in respect to violation of statutes, to weigh the credibility of witnesses, to evaluate testimony, to weigh testimony, to find facts, to sift hearsay evidence from so-called "legal" evidence and to determine finally if there is "sufficient legal evidence" produced during the hearing to sustain a finding of guilty.

It is respectfully submitted that a duly licensed physician of the State of New York has no training, qualifications, or competency to perform the aforementioned acts, regardless of how prominent or capable a member of the medical profession he may be.

The function they are called upon to perform is a judicial function, their training is in the field of medicine. Nothing in their medical training provides the necessary mental background to perform the judicial or legal work involved in holding the hearing herein under consideration.

Licensed physicians, although charged with the duty under existing statute, are not capable of determining whether the charges so brought, based on acts not specifically set forth in the statutes, constitute violations of constitutional rights.

D. Petitioner was Deprived of Due Process in that he was Deprived of the Right of Confrontation and cross-examination.

The record indisputably establishes that the sub-committee's finding of guilt was based on hearsay, thereby depriving petitioner of his fundamental right to confront the witnesses against him and depriving him of the fundamental right of cross-examining the evidence against him (*People* v. *Kendricks*, 300 N. Y. 544; *Snyder* v. *Massachusetts*, 291 U. S. 97, 106, 54 S. Ct. 330, 332).

E. Petitioner's Right to Due Process Was Violated by an Industry Body of Unpaid Private Citizens Performing a Public and Judicial Function of Holding the Hearing Resulting in Revocation of His License.

New York Education Law, § 6515, as it read in 1960 when the charges against petitioner were heard, provided, in subdivisions 1 and 2 thereof, that respondent's Committee on Grievances was to be composed of ten members, to be appointed by the respondent. The nominations to such Committee were to be by any duly incorporated State Medical or Osteopathic Society having 200 or more members. From these nominations, respondent was to appoint a Committee consisting of four members nominated by the Medical Society of the State of New York, two members by the New York State Homeopathic Society, one member by the New York State Osteopathic Society, and three members were to be appointed on the Regent's own nomination. It was mandatory for each member of the Committee to be a duly licensed physician of the State.

There is no provision for these members of the Committee to be paid compensation or salaries.

Under subdivision 4, members of this Committee were given jurisdiction to hear all charges against duly licensed physicians for violation of the provisions of § 6514 (except subd. 1). The Committee was charged with determining, upon such hearing, the charges upon their merits.

The Chairman of the Committee was authorized to designate three or more members of the Committee to hear and report upon such charges to the Committee.

The subdivision further provided for notice of hearing, the service of charges on the accused and for the accused to have the opportunity to appear either personally or by counsel at the hearing, where a stenographic record of the proceedings would be kept, with the right to produce evidence and witnesses upon his own behalf, to cross-examine

such witnesses, to examine such evidence as may be produced against him and to have subpoenas issued by the Committee. The subcommittee to whom such charges were referred was required to make a written report of findings and recommendations which were to be transmitted to the Secretary of the Grievance Committee with a transcript of the evidence.

The Grievance Committee was authorized to act upon such recommendations *as it should deem fit* and to take further testimony, if the same should seem desirable in the interest of justice.

The Committee was required to determine the charges upon their merits.

Under subdivision 5, the Committee, or any member thereof, was authorized to issue subpoenas and administer oaths in connection with any hearing under the Article.

Subdivision 5 further provided that the Committee was not to be bound by the laws of evidence in the conduct of its proceedings, but its determination was required to be founded upon *sufficient legal evidence to sustain the same.*

Clearly, from the above resumé, said § 6515 provided for the performance of a public function and a judicial function by an unpaid body of private citizens drawn from a specific industry or professional body of practitioners; to wit, licensed physicians.

That they were performing these public and judicial duties as private citizens is evidenced by the fact that they were unpaid and unsalaried, and it is a fair inference that the members of this Committee continued to carry on their private medical practice while they were in the performance of this public and judicial duty.

In *Fink* v. *Cole*, 302 N. Y. 216, 225, the New York State Court of Appeals held the delegation of a public function to a private corporation to be unconstitutional.

In *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 311, 56 S. Ct. 855, 873, this Court frowned on a similar practice and labelled as unconstitutional a statute which attempted to confer performance of a public function on an industry group of private citizens.*

Similarly, in *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 529, 537, 55 S. Ct. 837, 843, 846, this Court disapproved of the delegation of a public function to a private industry group.

F. Petitioner Was Deprived of Due Process in That Acts Charged Against Petitioner Were Not Set Forth, Defined or Contained in Statutes Charged.

Under 2(a), petitioner was charged with "submitting" false medical bills and reports to an attorney, I. Frank Miller.

Under 2(g), he was charged with entering into an illegal conspiracy with I. Frank Miller.

Subd. 2(a) provides that the license of a physician may be revoked, suspended or annulled if the physician is guilty of "fraud or deceit in the practice of medicine".

§6501, subd. 4, defines the practice of medicine as a holding out of "being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition" and an offering or undertaking "by any means or method, to diagnose, treat, operate or pre-

---

* "And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question. Schechter Poultry Corp. v. United States, 295 U. S. 495, at page 537, 55 S. Ct. 837, 79 L. Ed. 1570, 97 A. L. R. 947; * * *"

Carter v. *Carter Coal Co.*, *supra*.

scribe for any human disease, pain, injury, deformity or physical condition".

Therefore, there is no statutory definition that includes the alleged acts of "submitting" false reports within the meaning and scope of the term "in the practice of medicine", as it is used in subd. 2(a).

Therefore, the acts charged against the petitioner as a violation of subd. 2(a) are not set forth, defined or contained in subd. 2(a).

Similarly, under subd. 2(g), petitioner was charged with entering into an illegal conspiracy with Miller.

Subd. 2(g) provides that disciplinary proceedings may be invoked against a physician, if the physician "is or has been guilty of unprofessional conduct".

The subdivision goes on to give the regents power to promulgate rules to give effect to this subdivision. However, petitioner has not been charged with violation of any rules that may have been promulgated pursuant to this subdivision.

2(g) clearly makes no reference to the charged act of "conspiracy" and it is clear, therefore, that petitioner has been charged with an act in violation of 2(g) which is not set forth, defined or contained in the said subdivision.

It is obvious from a reading of subd. 2(a) and 2(g) that the legislature has failed to define the offenses that are charged against petitioner as being within the scope of the said subdivisions.

It is well settled law that the definition of offenses is an exercise of the legislative function. *U. S.* v. *Eaton*, 144 U. S. 677, 27 S. Ct. 764.

The failure of the legislature to set forth definite standards in the said subdivisions renders the said subdivisions constitutionally void for lack of a definite standard.

The said subdivisions, therefore, fall within the prohibition laid down in *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453, 59 S. Ct. 618, 619, where the court said:

> "No one may be required to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids . . ."

In finding petitioner guilty of the acts charged against him, respondent has been unconstitutionally exercising a legislative function in making its own standards *re* the definition of offenses.

If it be assumed, *arguendo*, that the respondent has this authority, then clearly it would have been given an unconstitutional delegation of legislative authority.

On the other hand, it may equally as validly be contended that the legislature has given respondent an unconstitutional delegation of legislative authority to set the standards, and that the subdivisions are void for lack of a definite standard.

In finding petitioner guilty of a violation of these said subdivisions therefore, respondent has deprived petitioner of his constitutional right to due process.

G. Petitioner Was Deprived of Due Process in That He Was Found Guilty of Acts Not Charged Against Him.

See discussion in subnote A, *supra*, pages 16-17.

In *Dejonge* v. *State of Oregon*, 29 U. S. 353, 362, 57 S. Ct. 255, 259, this Court said:

> "Conviction upon a charge not made would be sheer denial of due process."

H. Petitioner Was Deprived of Due Process by the Finding of Guilt Based on Hearsay and Not Supported by Evidence of Probative Value.

The record (R. 54-129) is saturated and replete with hearsay offered and received against petitioner at respondent's hearing.

There is no material or relevant evidence of probative value to establish the charge that petitioner "submitted" false reports and bills to Miller, or to support the finding that petitioner "issued" them.

The probative evidence establishes only that petitioner signed reports for Miller, when Miller presented them to petitioner, without petitioner examining the contents thereof. (See Sub-committee's "Findings", R. 193, f. 579 and Point XII, *infra*, p. 48).

This testimony is neither contradicted nor refuted.

Similarly, there is no material or relevant evidence of probative value to establish the charge that petitioner entered into an illegal conspiracy with Miller.

The finding of guilt, therefore, was predicated on hearsay and was not supported or substantiated by sufficient legal evidence, and is contradicted by the findings of fact. (R. 193, f. 579; Point XII, *infra*, p. 48).

In *Cosmopolitan* v. *Feuchtwanger*, 226 N. Y. S. 2d 584, 592, it was held that suspicion and conjecture cannot take the place of evidence.

I. Petitioner is Deprived of Due Process in That Punitive or Penal and Disciplinary Statute Was Enforced Against Him Retroactively and *Ex Post Facto*.

Subdivision 2(g), § 6514, became effective April 13, 1953.

Respondent enforced the said section against petitioner with respect to acts allegedly committed in 1951 and 1952.

Since a disciplinary statute accusing the accused of an offense against the public and providing for a penalty or forfeiture therefor has been held to be akin to a penal statute, it follows that the constitutional prohibition against *ex post facto* laws is therefore applicable to the subject statute, subd. 2(g).

It follows, therefore, that, on the basis of such a well settled and fundamental rule of law, 2(g), aside and apart from its other constitutional deficiencies, cannot constitutionally be applied to acts allegedly committed by petitioner prior to the effective date of 2(g). *Hopt* v. *Utah*, 110 U. S. 574.

J. Petitioner Was Deprived of Due Process by Respondent's Use of False Exhibit as Evidence, in Lieu of Original Exhibit.

It affirmatively appears (from respondent's letter, dated February 10, 1961, *supra*, p. 5), that petitioner's Exhibit D, introduced into evidence at respondent's hearing (R. 154), was somehow lost after it was received in evidence and that the hearing stenographer thereupon typed up a copy which was thereafter used as Exhibit D without it being made known by respondent that it was in fact a substitute for the original exhibit.

Not until after the matter was argued and submitted to the Appellate Division was it made known by respondent in the said letter of February 10th that this was the sequence of events.

The said explanatory letter of February 10th, however, is dehors the record and there is no indication as to what consideration, if any, was given to it by the Appellate Division in its consideration of the matter.

The fact is that it was the *false* exhibit that was before the Appellate Division during its consideration of the matter and the Court has not indicated it was aware that the exhibit before it was false.

It is a fair inference that the said false exhibit was the one considered by the respondent's hearing sub-committee when it reviewed the evidence, and it is a fair inference that any further review of the evidence by respondent's subsequent administrative procedures involved the use of this same false exhibit.

It seems likely, therefore, that the respondent's various administrative committees were deceived by this false exhibit, as well as the Court in its judicial review of the matter.

Considerable weight might have been given to this false exhibit by any reviewer of the evidence, based on the fact that the false exhibit was typewritten, whereas petitioner had contended that he was unable to submit any reports to Mr. Miller because he lacked secretarial services.

The false Exhibit D being a typewritten document, rather than the handwritten original exhibit, it clearly would tend to destroy both petitioner's credibility and his contention that the typed reports, which were the subject matter of the charges herein, were prepared by Miller, rather than by petitioner. This false exhibit, therefore, would obviously be a vital factor in destroying his credibility before the hearing committee, before the subsequent reviewing committees and before the Courts.

Obviously, in view of the use made of this false exhibit, petitioner was denied a fair hearing and has been deprived of due process.

In a somewhat similar situation, this Court has said:

> "Suppression of evidence or its concealment from a party whose rights are being determined by the administrative tribunal has been held to be so unfair as to invalidate the administrative proceeding * * *. It is equally offensive to conceal from the experts, whose judgment is accepted as controlling, facts

which might properly have influenced their opinion." *Lloyd, etc.* v. *Elting*, 287 U. S. 329, 339, 53 S. Ct. 167, 172.

It is respectfully submitted that under these circumstances the irregular use of this false evidence requires a new hearing in the interest of justice.

Lewis v. *Johnson* (1 Cir. 1926), 16 F. 2d 180, 182.

K. Due Process is Lacking Where, as Here, the One Who Decides Did Not Hear the Evidence.

It has frequently been held that due process is lacking and a fair hearing has not been given if the one who decides the matter did not hear the evidence.

It was so stated by this Court in *Morgan* v. *United States*, 298 U. S. 468, 480-481, 56 S. Ct. 906, 911, where the Court stated:

> "If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given."

The record herein will demonstrate (R. 204) that the respondent voted on September 30, 1960, to accept the Regents' Committee on Discipline's recommendation that petitioner's license be revoked, and nowhere does it appear that, in accepting this recommendation, the Board of Regents made any study of the evidence or reviewed the matter in any way.

In a somewhat similar situation, involving another administrative agency of the State of New York, the New York State Supreme Court said:

> "It is the function of the respondent to exercise its discretion on the basis of evidence in the record, not on a resume and recommendation of the hearing officer. If the determination is based merely on the

resume and report of the hearing officer it is in fact a determination of the hearing officer and not of the respondent. The statute does not permit the respondent to delegate to a subordinate its powers to approve or reject applications." *O'Dea's Bar and Restaurant, Inc.* v. *New York State Liquor Authority*, 201 N. Y. S. 2d 340, 342 (S. Ct., Sp. Term, Nassau County, 1960).

POINT VI

Petitioner has been deprived of due process, as due process requires that police power, penal and/or disciplinary statutes must be strictly construed.

In *Marburg* v. *Cole*, 286 N. Y. 202, 206, the New York State Court of Appeals held that licensing of doctors is an exercise of the police power of the state.*

The New York State Court of Appeals in the case of *In re Donegan*, 282 N. Y. 285, said at page 292 (in respect to revocation of a license to practice law) that a statute revoking a license must be strictly construed:

> "But there is a further reason for such an interpretation. Although disbarment is not strictly a punishment for crime, but only the withdrawal of a privilege (Matter of Rouss, 221 N. Y. 81, 91, 116 N. E. 782), it cannot be denied that the requirement of automatic and irrevocable disbarment for life provided by the Judiciary Law, is in effect a consequence most severe, and partakes of the nature of punishment. Hence the statute must be interpreted in the light of the fundamental canon that penal statutes must be strictly construed."

---

* "In order to protect the health and provide for the welfare of the citizens of the state, the Legislature in the exercise of the police power of the state has enacted laws requiring a certain standard of learning and training of those who undertake to preserve or repair the human body."

Marburg v. *Cole*, 286 N. Y. 202, 206.

Obviously, there is no distinction between the revocation of a license to practice law and revocation of a license to practice medicine. It follows, therefore, that the subject statutes herein involved must be strictly construed, as is the rule with penal statutes. *Hilfer* v. *Board of Regents*, 283 N. Y. 304, 308.

See also *People* v. *Bene*, 288 N. Y. 318.

It is therefore clearly the law in New York State that penal or disciplinary statutes must be strictly construed in a manner not to embrace cases which do not clearly fall within their terms and that such statutes can not be extended by intendment and no act, however wrongful, can be punished under such a statute unless clearly within its terms (*People* v. *Levy*, 128 N. Y. S. 2nd 275, 283 A. D. 383).

This Court held in *Lanzetta* v. *State of New Jersey*, 306 U. S. 451, 453, 59 S. Ct. 618, 619, that:

> "No one may be required at peril of * * * property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids."

The Court went on to quote the applicable rule as stated in *Connally* v. *General Construction Company*, 269 U. S. 385, 391, 46 S. Ct. 126, 127:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

In this regard, subds. 2(a) and 2(g) of Education Law. Sec. 6514 clearly do not define, set out or prohibit the acts charged against petitioner.

Subd. 2(a) provides that a physician may be disciplined on a finding:

> "That a physician * * * is guilty of fraud or deceit in the practice of medicine * * * ". (appendix, p. 24a)

2(a) clearly provides that a licensee may be disciplined for fraud or deceit in the practice of medicine, but does not define or set out what acts shall constitute such fraud and deceit.

This clearly falls within the prohibitions set forth hereinabove that such statute may not be enlarged or extended beyond its clear meaning and that those who are subject to its control should not be required to speculate as to what acts are prohibited by the statute. The statute is required to clearly define the prohibited acts so that those whose conduct is to be controlled may clearly know, without speculation, what the prohibited acts are. *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453, 59 S. Ct. 618, 619.

It is further contended that the acts charged against petitioner were not performed "in the practice of medicine", as that term is defined in the New York State Education Law, Sec. 6501, subd. 4, which reads as follows:

> "The practice of medicine is defined as follows: A person practices medicine within the meaning of this article, except as hereinafter stated, who holds himself out as being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition, and who shall either offer or undertake, by any means or method, to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition."

Clearly, the term "in the practice of medicine" does not include within the statutory definition the act charged against petitioner of "submitting" false and exaggerated bills to an attorney and does not include within the statutory definition the act that he was found guilty of, to wit, that he "issued" false and fraudulent bills and medical reports.

It is fundamental law that the administrative agency charged with enforcing a disciplinary statute may not extend the scope of that statute or enlarge it in any degree whatsoever. *Hilfer v. Board of Regents*, 283 N. Y. 304, 308.

It appears clear that the respondent herein has violated this fundamental concept of constitutional law and, without a statutory standard being given to it by the Legislature, has taken unto itself the power to determine its own standards as to what shall constitute "fraud or deceit in the practice of medicine"; and has undertaken to extend its authority to penalize or control conduct not within the statutory definition of "practice of medicine."

What was said hereinabove with respect to Subd. 2(a) is also applicable to Subd. 2(g), which provides:

> "That a physician is or has been guilty of unprofessional conduct." (appendix, p. 24a).

It should be noted that the remainder of the sub-division provides that respondent herein "shall have power to promulgate rules to give effect to this section" but it should be further noted that petitioner was not charged with violation of any rule that may have been promulgated by the respondent and was, in fact, charged only with violation of the sub-division itself.

The statute clearly appears to be vague and indefinite and no standard is set by the Legislature as to what conduct is prohibited by its terms.

Under this sub-division, petitioner was charged with, and found guilty of, an illegal conspiracy based on the alleged submission of false and fraudulent medical bills and reports.

Again, nothing in the statute prohibits the conduct charged against petitioner. The statute, therefore, if it can be charged against petitioner, is constitutionally defective because it fails to inform those whose conduct is to be controlled as to what acts are prohibited. *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453, 59 S. Ct. 618, 619.

Only by speculation, alone, can one arrive at a determination of what would be or might be "unprofessional conduct."

Under the said statute, it necessarily follows, therefore, that respondent, in construing 2(a) and 2(g), has broadened the terms thereof so as to include and prohibit conduct not specifically prohibited by the Legislature; and, in so doing, respondent has assumed a power and authority that constitutionally it does not and cannot possess.

The acts charged against petitioner may not be included within the contemplation of 2(a) and 2(g) except by implication. Such inclusion by implication is constitutionally prohibited. (*People* v. *Levy*, 283 A. D. 383, 128 N. Y. S. 2nd 275; *People* v. *Bone*, *supra*, 288 N. Y. 318; *Lanzetta* v. *State of New Jersey*, *supra*, 306 U. S., 451, 453, 59 S. Ct. 618, 619; in re *Donegan*, *supra*, 282 N. Y. 285, 292; *Gooch* v. *U. S.*, 297 U. S., 124, 128, 56 S. Ct., 395, 397)

In *People* v. *Kightlinger*, 89 N. Y. S. 2nd 755, modified 93 N. Y. S. 2nd 636, affirmed without opinion 301 N. Y., 639, the court held that a penal statute must be construed against the state, and may not be given a construction adding to the provisions of the statute something that is not clearly contained or defined therein.

And in *People* v. *Glubo*, 5 N. Y. 2nd, 461, 186 N. Y. S. 2nd 26, the New York State Court of Appeals held penal statutes should apprise the citizenry of exactly what is forbidden.

Clearly, 2(a) and 2(g) do not apprise the citizenry affected by their terms of "exactly" what is forbidden. In *People* v. *Shapiro*, 4 N. Y. 2nd 597, 176 N. Y. S. 2nd 632, the New York State Court of Appeals held that penal statutes are to be strictly construed against the parties seeking their enforcement and are to be construed in favor of persons being proceeded against.

To emphasize that we are here concerned with a penal statute, or one which is to be construed as a penal statute, reference is made to the case of *Olsen* v. *Olsen*, 27 Misc. 2nd, 555, 209 N. Y. S. 2nd 503, where the court held that the test of the penal character of a statute is whether it appears, to the tribunal which is called upon to enforce it, to be a punishment of an offense against the public; and to the case of *Julien J. Studley, Inc.* v. *Geisinger*, 12 Misc. 2nd 527, 177 N. Y. S. 2nd 776, affirmed 7 A. D. 2nd 844, 182 N. Y. S. 2d 326, where the court held that a statute prescribing a penalty must be strictly construed.

POINT VII

Petitioner was deprived of due process in that lack of an adequate or intelligible standard in 2(a) and 2(g) renders them void and violative of due process.

Since 2(a) and 2(g) do not establish or contain adequate or explicit standards as to what conduct is prohibited, the administrative agency charged with their enforcement has been delegated unfettered discretion to set the standards of conduct, and such delegation of legislative function is constitutionally defective, with the result that the said sections are, therefore, void.

2(a), providing for disciplinary action against a physician guilty of fraud or deceit in the practice of medicine, does not delineate what acts constitute fraud or deceit, although the term "in the practice of medicine" is defined in §6501, subd. (4) of Education Law.

Respondent may not supply the missing part that is to make the statute whole or valid, for that is constitutionally a legislative function which respondent cannot constitutionally perform and which the Legislature may not constitutionally delegate to it.

The same is true of 2(g). It purports to provide disciplinary measures for unprofessional conduct, but does not set out what acts constitute "unprofessional conduct".

Petitioner was charged with "conspiracy" under 2(g), but that charge is not set out in the statute.

Here, too, respondent may not set its own standard of conduct to supply what the Legislature omitted.

This delegation of unfettered discretion by the Legislature has been disapproved in *Fink* v. *Cole*, 302 N. Y. 216, 225; *Packer Collegiate Institute* v. *University of State of New York*, 298 N. Y. 184, 189, 191-192; *Small* v. *Moss*, 279 N. Y. 288, 299; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 55 S. Ct. 241; *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 55 S. Ct. 837.

See also *Chicago, etc.* v. *Chicago*, 166 U. S. 226, 234-235.

Clearly, the definition of offenses is the exercise of legislative function. *United States* v. *Eaton*, 144 U. S. 677, 27 S. Ct. 764.

In *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453, 59 S. Ct. 618, 619, this Court said:

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." The applicable rule

is stated in Connally v. General Const. Co., 269 U. S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322: "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

Under the well settled rules of constitutional construction, 2(a) and 2(g) are invalid as repugnant to such constitutional rules.

POINT VIII

Petitioner was deprived of due process in that the delegation of unfettered discretion to respondent in the pertinent provisions of § 6515 is contrary to constitutional requirements of due process and the subject provisions are, therefore, constitutionally void.

Under subdivision (4) of § 6515, as it read at the time of the subject hearing herein, the subcommittee hearing the charges was required to make a written report of its findings and recommendations, which was to be transmitted to the Committee on Grievances.

The subdivision then provided:

> "said grievance committee may thereupon act upon such recommendation *as it shall deem fit*, * * *". (Italics supplied.)

This is clearly unfettered and unlimited delegation of discretion without any standards whatsoever to guide the

Committee in its actions. It is clearly given authority to take such action "as it shall deem fit", without any limitation.

The same subdivision, (4), then goes on to provide for the transmitting to the Department of Education of the record, findings and determination, if the practitioner has been found guilty, along with their recommendation, and the Regents are then authorized to:

> "* * * *in their discretion* execute an order accepting or modifying such determination of the Committee as hereinabove provided." (Italics supplied.)

Here, again, is a delegation of unlimited and unfettered discretion to take whatever action the Regents decide to take in the exercise of their own discretion, without any standard whatsoever to guide their conduct or to guide or limit their discretion.

In subdivision (5), the Grievance Committee was authorized to be free from the requirements of the laws of evidence in the conduct of its hearings and it is further provided that:

> "* * * but the determination shall be founded upon sufficient legal evidence to sustain the same."

Here, again, no standard is set to guide the Committee as to what shall constitute "sufficient legal evidence", and the Committee of legally untrained doctors is free to determine for itself what shall constitute "sufficient legal evidence".

Obviously, it is not possible to determine from this delegation of discretion to the Committee whether a "preponderance" of legal evidence is sufficient legal evidence, whether "substantial" legal evidence is sufficient legal evidence, whether "some" legal evidence is sufficient legal evidence, or whether a "scintilla" of legal evidence is sufficient legal evidence.

From all of the above, it is clear that completely unfettered discretion has been delegated to the Committee under the provisions of §6515 and that this unfettered delegation of discretion without limit or standard violates constitutional rules and is, therefore, void. *Packer Collegiate Institute* v. *University of New York*, 298 N. Y. 182, 189; *Small* v. *Moss*, 279 N. Y. 288, 299.

In *Small* v. *Moss*, *supra*, at page 299, the Court said:

> "The Legislature must set bounds to the field, and must formulate the standards which shall govern the exercise of discretion within the field. Without the second rule as a corollary to the first rule there would be no effective restraint upon unfair discrimination or other arbitrary action by the administrative officer."

POINT IX

Petitioner was deprived of due process in that Education Law § 211 is an unconstitutional delegation of unfettered discretion to the respondent to make an arbitrary determination, regardless of the evidence, and such provision is unconstitutional and void.

Education Law, § 211, provides for hearings to be held upon the record before a subcommittee of the Regents, which subcommittee shall render a written report to the Regents, including a statement as to the findings of fact and the evidence, together with their recommendations, and it further provides that:

> "* * * and the Regents, without further hearing, shall *in their discretion* execute an order accepting or changing the determination of the Grievance Committee or Board of Examiners." (Italics supplied.)

Here, obviously, the Board of Regents was given completely unfettered discretion to make whatever determination they shall, in their discretion, see fit, with no limits whatsoever set to the exercise of their discretion.

Obviously, under this provision, the Regents could find an accused guilty, even if the evidence conclusively established innocence.

This is clearly the exercise of arbitrary power, prohibited by constitutional rules. *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 55 S. Ct. 837.

In *Stuart v. Palmer*, 74 N. Y. 183, 188, the New York State Court of Appeals held that the constitutional validity of the law is to be tested not only by what *has* been done under it, but by what *may* be done under its authorization.

POINT X

Petitioner was deprived of due process in that the respondent's Committee on Grievances was not properly constituted in accordance with the provisions of subdivisions 1 and 4 of § 6515, and these proceedings were, therefore, void, resulting in lack of due process in the revocation of petitioner's license.

§ 6515, as it read at the time of the subject hearing, provided in subdivision 1 that the Grievance Committee was to consist of ten members appointed by the Regents.

Subdivision (4) provided that the members of such Committee shall have jurisdiction to hear all charges against duly licensed physicians for violation of the provisions of § 6514 (except subd. 1).

In lieu of a hearing by the committee of the whole, subdivision (4) authorized the Chairman of the Committee to designate three members of the Grievance Committee to act as a subcommittee to hear the charges.

When such charges were referred to a subcommittee to hear and report, the subcommittee was required to make a

written report of its findings and recommendations to be transmitted to the Committee on Grievances with a transcript of the evidence.

Subdivision (4) then went on to provide that:

> "Thereupon the Committee shall determine such charges upon their merits (the vote of each member of such Committee to be recorded as part of the Committee's findings). If by unanimous vote the practitioner is found guilty of such charges or any of them the Committee shall transmit to the Department the record, findings and determination * * * ".

Clearly, therefore, subdivision (4) is specifically and unequivocally providing that a finding of guilty could result only from the *unanimous* vote of the full Committee of ten members.

In respect to this same provision of subdivision (4), the New York State Court of Appeals in the case of *Hilfer* v. *Board of Regents*, 283 N. Y. 304, said at page 308:

> "'The mode or way in which the act shall be done or the determination reached * * * must be strictly pursued, otherwise the act or the determination will be void.'"

The Court below reached a clearly erroneous interpretation when it interpreted subd. 9 as providing that the Grievance Committee could vote a finding of guilty with only a quorum of the Committee.

That this interpretation is erroneous is clearly demonstrated by a close reading of the said subd. 9. It clearly appears therein that a quorum of the Committee is permitted to act *only when it is sitting as a Committee of the whole for the sole purpose of conducting a hearing.*

The provisions of subd. 9 thus do not conflict with the provision in subd. 4 that, when a subcommittee holds the hearing and reports thereon to the Committee, the Com-

mittee's vote must be *a unanimous vote of the full ten members*. There is no provision made for the unanimous vote to be by a quorum of the Grievance Committee.

Since it is undisputed that the vote of the Grievance Committee in the case at bar consisted, not of the unanimous vote of *ten members*, but of the unanimous vote of *nine members* (R. 197), the proceedings of the said Grievance Committee are null and void, as not being performed in full compliance with the statutory requirements. *Hilter v. Board of Regents, supra*, 283 N. Y. 304, 308.

In *People v. Grandstein*, 245 N. Y. S. 523, the Appellate Division held that penal statutes must be strictly construed in favor of the accused.

In re Donegan, 282 N. Y. 285, the New York State Court of Appeals held at page 292 that a disciplinary statute, just as a penal statute, must be strictly construed. The Court said of such a statute:

> "Hence the statute must be interpreted in the light of the fundamental canon that penal statutes must be strictly construed."

In *People v. Kightlinger*, 89 N. Y. S. 2d 755, modified 93 N. Y. S. 636; affirmed 301 N. Y. 639, without opinion, the Court held that a penal statute must be construed against the State.

In *People v. Shapiro*, 4 N. Y. 2d 597, the New York State Court of Appeals held that penal statutes are to be strictly construed against the parties seeking their enforcement and in favor of persons being proceeded against.

Petitioner's contention in this regard is emphasized by a reading of the present provisions of § 6515, which now provides in subdivision (4) that, at any meeting of the Committee, the presence of a quorum shall be necessary, followed by the new provision in subdivision (4), in respect to the unanimous vote, which now reads that:

"If by unanimous vote *of the members present* the practitioner is found guilty of such charges * * *". (Material italicized is new.)

This italicized new material, coupled with the new requirements of subdivision (1), that a quorum shall be necessary at any meeting of the Committee, emphasizes that, under the *present* § 6515, a unanimous vote of a quorum is sufficient.

These changes became effective in 1961 and do not affect the hearing that was held in the case at bar, in 1960.

The changes, however, serve to demonstrate the validity of the contentions hereinabove set forth, to wit, that at the time petitioner's hearing was held, the unanimous vote of the ten members of the Grievance Committee was required for a finding of guilt.

It is further submitted that the statutory requirement that the committee consist of 10 men renders a 9 man committee a nullity, and the proceedings of a committee that is a nullity can have no validity and are void.

The quorum provisions of subd. 9 of sec. 6515 apply only when the committee of the whole chooses to hold the hearing on charges against a physician instead of delegating the hearing to a subcommittee, in which case a quorum of 6 was authorized to proceed with the hearing, but the quorum provision clearly did not authorize the committee to be constituted of less than the 10 set in the statute, subd. 1 of sec. 6515.

POINT XI

Petitioner's constitutional rights were violated when he was compelled to testify against himself and was deprived of the aid of counsel.

Petitioner was subpoenaed and compelled to appear and testify before the so-called Arkwright Committee.

During his interrogation, petitioner's attorney was excluded from the hearing room, so that petitioner was deprived of the aid of counsel, in violation of his constitutional rights.

The rule of law, that a witness has no right to the aid of counsel is not applicable when the witness, so-called, is, in fact, the target of the inquiry, or one of the targets, as here.

The actual circumstances demonstrate that Mr. Justice Arkwright, conducting the hearings, peremptorily excluded petitioner's counsel during the course of petitioner's interrogation.

As is now evident, petitioner was in fact a prospective defendant within the contemplation of the said investigation.

He Was Not Informed That He Was a Prospective Defendant.

It is respectfully submitted, therefore, that under the said circumstances, petitioner had a constitutional right to aid of counsel at all stages of the proceeding, and that his constitutional rights were violated in that he was compelled to be a witness against himself.

In respondent's hearing, the fruits of the unconstitutional violation, the minutes of the interrogation of petitioner before Mr. Justice Arkwright, were read into evidence and made part of the evidence against petitioner.

As a result of this procedure, due process has been violated. *Powell v. Alabama*, 53 S. Ct. 55, 64.

POINT XII

Respondent's sub-committee found petitioner guilty on inconsistent and conflicting findings of fact which establish innocence, not guilt.

The charges made were that petitioner "submitted" false reports and bills to Miller (R. 44, f. 131).

Respondent's sub-committee found petitioner guilty of "issuing" them (R. 190, f. 570), but also found that:

> "* * * the medical bills and reports were prepared by the attorney and signed by the respondent * * *" (R. 193, f. 579).

It seems clear, therefore, *that the attorney prepared the subject reports and bills*, not petitioner herein.

It follows, therefore, that the charge that petitioner "submitted" such reports and bills to the same attorney is refuted by the sub-committee's own finding that it was the attorney who prepared them, and, therefore, they could not have been "submitted" to him by petitioner, as charged.

The ordinary meaning of words establishes that material is not "submitted" to the originator of the material.

The sub-committee's finding that the attorney "prepared" the reports also refutes its finding that it was petitioner who "issued" them.

Conclusion

Part of petitioner's right to due process is the right to have his day in Court and to be heard. *Truax v. Corrigan*, 257 U. S. 312, 42 S. Ct. 124.

It has been well said that "his day in Court" means the right to be heard in the Court of last resort on constitutional questions. *Aero Design v. Oklahoma*, 154 F. Supp. 844, affirmed 77 S. Ct. 824.

It has also been well said by this Court that beneficent aims, however great or well directed, can never serve in lieu of constitutional power (*Carter v. Carter Coal Co.*, 298 U. S. 238, 291, 56 S. Ct. 855, 864) and the Seventh Circuit appropriately and succinctly stated that:

> "True it is that administrative convenience or even necessity cannot override the constitutional requirements of due process. Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U. S. 292, 304, 57 S. Ct. 724, 81 L. Ed. 1093."
>
> *Cella v. United States*, 208 F. 2d 783, 789, cert. den. 347 U. S. 1016, 74 S. Ct. 864.

Wherefore, petitioner respectfully prays that the writ of certiorari issue so that the constitutional questions herein set forth may be heard in this Court of last resort, and prays that, on such hearing, this Court vacate and set aside respondent's order revoking petitioner's license to practice medicine in the State of New York.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioner.

LIBRARY

Office Supreme Court, U.S.
FILED
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

No. 227

DAVID WASSERMANN,

Petitioner,

against

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, THIRD DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

JACOB RASSNER,
Counsel for Petitioner,
Office & P. O. Address,
15 Park Row,
New York 38, N. Y.

INDEX

	PAGE
Opinion of Court of Appeals	1a
Opinion of Appellate Division—Third Department	7a
Vote of Board of Regents	9a
Report of Regents' Committee on Discipline	10a
Report of Regents Committee	13a
Report of Findings, Determination and Recommendation of Sub-Committee on Grievances	16a
Laws Involved	22a
Appellate Division Order Denying Leave to Appeal	30a
Motion for Leave to Appeal to Court of Appeals	32a
Affidavit of Arnold Ostwald in Support of Motion for Leave to Appeal	34a
Brief in Support of Motion for Leave to Appeal to the Court of Appeals	41a
Brief of Petitioner-Appellant	45a
Court of Appeals Remittitur	48a
Motion to Amend Remittitur	50a
Affidavit of John P. Weatherwax in Support of Motion to Amend Remittitur	52a
Court of Appeals Order Denying Motion to Amend Remittitur	57a
Appellate Division Order Adopting Remittitur	58a
Contemporary Newspaper Articles (Photostat)	61a

APPENDIX

Opinion of Court of Appeals

In the Matter

of

DAVID WASSERMANN,

Appellant,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondent.

Decided April 5, 1962.

FOSTER, J. After a formal hearing before a subcommittee of the Medical Committee on Grievances, appellant was found guilty of fraud or deceit in the practice of medicine (Education Law, § 6514, subd. 2, par. [a]) and of unprofessional conduct (Education Law, § 6514, subd. 2, par. [g]). He was charged with submitting false and exaggerated medical reports and bills to an attorney for use in settling personal injury cases. The findings of fact were supported by substantial documentary evidence and testimony and were confirmed by the Medical Committee on Grievances and the Regents' Committee on Discipline. Appellant's license to practice medicine was revoked.

We now are asked to determine whether the acts specified constituted "fraud or deceit *in the practice of medicine*" within the meaning of the Education Law.

It is contended that the Education Law (§ 6514, subd. 2, par. [a]) authorizes suspension or revocation of a license to practice medicine only after a finding, upon due hearing, "That a physician * * * is guilty of fraud or deceit

in the practice of medicine" (italics supplied), and that this record reveals no such fraud in "*the practice of medicine*", as that term is defined in subdivision 4 of section 6501 of the Education Law. The latter section and subdivision provides: "A person practices medicine within the meaning of this article. * * * who holds himself out as being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition, and who shall either offer or undertake, by any means or method, to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition."

Appellant asserts that this definition, when read in the context of other provisions of the Education Law, limits discipline for fraud or deceit in the practice of medicine to practices of so-called "quacks" and "charlatans" who practice their fraud within the physician-patient relationship directly upon the patient. He argues that at no time did he mistreat a *patient* or deliberately submit a false bill or diagnosis to a *patient*. His "fraud", he claims, was in the realm of the business world, was private in nature, and did not involve his practice of medicine nor cast any doubt upon his behavior or ability insofar as patients were concerned. This argument cannot be accepted.

In the first place, appellant did "hold himself out" as being able to diagnose and treat the conditions of each of the patients involved. In the case of Kaminsky, and possibly of Gonzales, he also "offered" and "undertook" to diagnose their conditions, and this he did fraudulently, insofar as the Transit Authority and insurance company were concerned. In the cases of Mrs. Turner, George Turner, and Sadie Cohen, appellant "offered" to the insurance company to diagnose their conditions and fraudulently submitted his diagnoses to the insurance company without having treated or examined the patients. In all cases, then,

appellant did "hold himself out" *and* did "offer" or "undertake" to diagnose the physical conditions of the patients. Therefore, he was engaged in the practice of medicine when he committed the fraudulent acts (§ 6501, subd. 4, *supra*).

Nothing in the statute limits discipline for fraudulent diagnoses to cases where the fraud is perpetrated directly on the patient. Indeed, insurance companies are frequently the ultimate payers of medical bills in personal injury cases, and in this respect are just as much entitled to true medical reports and bills as are the patients. Appellant's fraudulent scheme, of course, was dependent upon misuse of his medical license, and the submission of false reports and bills to interested persons was an integral part of his medical practice. The preparation of medical reports for various purposes has always been regarded as a necessary part of medical practice, and it makes no difference whether false reports are submitted directly to the patient, attorney, or the insurance company on behalf of the patient. The statute authorizes discipline in any event.

Submissions of false reports of various types to interested persons or institutions other than the patient himself have been found to constitute "fraud or deceit in the practice of medicine" in numerous cases (*Matter of Hutschnecker* v. *Board of Regents*, 269 App. Div. 891, affd. 295 N. Y. 558; *Matter of Siegal* v. *Board of Regents*, 270 App. Div. 783, motion for leave to app. den. 295 N. Y. 993; *Matter of Tompkins* v. *Board of Regents*, 299 N. Y. 469; *Matter of Ray* v. *Board of Regents*, 9 A D 2d 560; *Matter of Mester* v. *Board of Regents*, 259 App. Div. 776).

Appellant argues that these cases establish that the concept of "fraud or deceit in the practice of medicine" may be extended beyond fraud in the physician-patient relationship only in cases involving issuance of fraudulent *required*

reports, or cases involving fraud which affects a vital public interest or interferes with governmental control in an area of public concern. Thus, it is argued, the extension in *Tompkins* (*supra*) was permissible since interference with supervision over traffic in narcotics was involved. However, none of the cases above cited turned on the fact that the false reports were required by law. But, assuming that appellant's argument is a sound one, the fraud on the insurance companies here involved did affect a vital public interest and did affect governmental regulation of insurance companies and their rates. The public also was, or could have been, indirectly affected by fraud against the Transit Authority. Thus fraud or deceit in the practice of medicine was established, and this was sufficient to sustain the action of the board without regard to other statutes or regulations.

In addition, revocation was permissible under the other subdivision involved. Section 6514 (subd. 2, par. [g]) provides that "unprofessional conduct" shall be grounds for discipline. The Regents are given power to promulgate regulations to give effect to that section. That statute was enacted in 1953 (L. 1953, ch. 682, eff. April 13, 1953). Subdivision 4 of section 30 of the Regulations of the Commissioner of Education specifies certain acts constituting "unprofessional conduct" but specifically states that "Unprofessional conduct" "shall * * * not be limited to the following". These regulations were adopted October 28, 1955 and filed January 10, 1956. (N. Y. Off. Comp. of Codes, Rules & Regs. [11th Supp.], pp. 231-232, now 8 NYCRR 60.1, subd. [d].) It is argued that section 6514 (subd. 2, par. [g]) and subdivision 4 of section 30 of the Regulations illegally were applied retroactively here. Assuming that this statute and the regulations were not intended to be

applied retroactively, discipline nevertheless was authorized.

The statute itself authorized discipline for unprofessional conduct, effective April 13, 1953. Appellant's conspiracy to commit unprofessional acts continued past that date, and well into 1956, when the reports involving Morales and Gonzales were issued. Under the statute itself, without resort to the merely explanatory regulations (which do not purport to contain exhaustive definitions of unprofessional conduct), the board was entitled to find that the fraudulent conspiracy involving appellant was "unprofessional". Appellant's participation was malum in se and undoubtedly amounted to "unprofessional conduct" under the standards commonly accepted by physicians in this State (*Matter of Cherry* v. *Board of Regents*, 289 N. Y. 148, 158-161; *Matter of Bell* v. *Board of Regents*, 295 N. Y. 101).

Moreover, the acts were so obviously wrong and violative of the standard of ethics expected of a physician that they constituted "unprofessional conduct" even in the absence of regulations defining the term (*Matter of Bell* v. *Board of Regents, supra*). The conspiracy, though commenced prior to enactment of the statute authorizing discipline for unprofessional conduct, continued over into the post-statutory period, and thus discipline pursuant to its provisions was justified (cf. *People* v. *Hines*, 284 N. Y. 93, 112-114). The conspiracy also carried over into a period subsequent to the filing of the regulations. But the regulations did not "limit" unprofessional conduct to the acts therein defined (this is expressly stated in § 30, subd. 4), and thus the absence in the regulations of a description of the behavior herein condemned does not help appellant.

When the Committee on Grievances rendered their formal findings, determination and recommendation, there was an unfilled vacancy as the result of the death of one

member. Subdivision 1 of section 6515 of the Education Law provides that the committee shall consist of 10 members, and subdivision 4 requires a unanimous vote to find a physician guilty. However, 6 members constitute a quorum (Education Law, § 6515, subd. 9), and here there was a unanimous vote of a committee consisting of more than the required quorum. Such a vote was a unanimous decision (see *Harroun* v. *Brush Elec. Light Co.*, 152 N. Y. 212). We have considered carefully the other issues raised by appellant and find them to be without merit.

The order appealed from should be affirmed, without costs.

Chief Judge DESMOND and Judges DYE, FULD, FROESSEL, VAN VOORHIS and BURKE concur.

Order affirmed.

Opinion of Appellate Division—Third Department

SUPREME COURT

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT

Decision handed down March 21, 1961

2945

In the Matter

of

The Application of DR. DAVID WASSERMANN,
Petitioner-Appellant,

For an order pursuant to Article 78 of the Civil Practice Act,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,
Respondent-Respondent.

This is a proceeding under Article 78 of the Civil Practice Act to review a final determination of The Board of Regents revoking petitioner's license to practice medicine.

Petitioner was charged with fraud or deceit in the practice of medicine in that he submitted to an attorney false medical reports and false bills to assist the attorney in making false claims for personal injuries. Petitioner was also charged with unprofessional conduct in the practice of medicine in that he entered into an illegal conspiracy, scheme and agreement with an attorney whereby false and

fraudulent medical bills and reports were prepared. A sub-committee of the Medical Grievance Committee conducted hearings and has found the petitioner guilty as charged. The Committee on Grievances and the Regents' Committee on Discipline unanimously confirmed the findings of the sub-committee. There is ample evidence in the record to sustain the determination.

Petitioner has been found guilty of very serious charges; and we may not say that the revocation of petitioner's license was an abuse of discretion which warrants interference by this court. The circumstances surrounding this case are very similar to those in *Matter of Shaw* v. *Board of Regents* (— A. D. 2d —) decided herewith.

Petitioner also contends that the findings, determination and recommendation of the Committee on Grievances are void because it was the unanimous decision of only nine members of the Committee whereas Section 6515(1) of the Education Law provides that the Committee shall consist of ten members and subdivision (4) provides for an unanimous vote to find a practitioner guilty. Such a contention is without merit. The record clearly shows that there was an unfilled vacancy on the Committee as the result of the death of a member. Subdivision (9) provides that, "A quorum of the committee shall consist of six members." Here all nine members participating voted that petitioner was guilty of the charges and voted for the recommended discipline. The unanimous vote of a committee consisting of more than a legal quorum is a unanimous decision. (Cf. *Harroun* v. *Brush Electric Light Co.*, 152 N. Y. 212.)

Determination unanimously confirmed, without costs.

Present—Bergan, P. J., Coon, Gibson, Herlihy and Reynolds, JJ.

Vote of Board of Regents

Adopted September 30, 1960

Upon the report of the Regents Committee on Discipline, made in accordance with the provisions of Section 211 of the Education Law, it was

Voted, That the determination of the Medical Committee on Grievances in the matter of the application for the revocation of the license heretofore granted to David Wassermann, New York, to practice medicine in the State of New York as a physician be accepted and sustained; that in compliance with the recommendation of said Committee, medical license No. 34653, issued under date of January 27, 1938, to said David Wassermann permitting him to practice medicine in the State of New York, be revoked, annulled and canceled, and that his registration or registrations as a physician, wherever they may appear, be ordered annulled and canceled of record; and that the Commissioner of Education be empowered and directed to execute, for and on behalf of the Board of Regents, all orders necessary to accept the determination of said Medical Committee on Grievances and to carry out the terms of this vote.

Report of Regents' Committee on Discipline

THE UNIVERSITY OF THE STATE OF NEW YORK

THE STATE EDUCATION DEPARTMENT

IN THE MATTER

of the

Application for the Revocation of the authorization and license heretofore granted to DR. DAVID WASSERMANN to practice as a physician in the State of New York, and for the cancellation of his registration as such, and for such other relief as the premises warrant.

To the Board of Regents:

Your Committee on Discipline reports as follows:

On July 12, 1960, at 2 West 45th Street, New York, New York, a hearing was accorded DAVID WASSERMANN at which he neither appeared in person nor by attorney. Thereafter, Reed B. Dawson, Esq., his attorney, requested that this proceeding be further considered at the next meeting of your Committee. Accordingly, on September 13, 1960, a hearing was granted David Wassermann at which time he appeared in person and by Reed B. Dawson, Esq., his attorney, along with a new attorney, Angelo A. Tumminelli, Esq. Respondent, through his attorney, Reed B. Dawson, Esq., submitted a brief with a request that the matter be so disposed of. John J. Calanese, Esq., Assistant Attorney General, represented the State.

Copies of charges against said David Wassermann, and of the findings, determinations, and recommendation of the Subcommittee of the Medical Committee on Grievances and of the Medical Committee on Grievances are attached hereto and made a part hereof.

Report of Regents' Committee on Discipline

Your Committee has examined the record submitted and has given careful consideration thereto and to the arguments of counsel.

David Wassermann was born on January 13, 1912, and was licensed to practice medicine in the State of New York on January 27, 1938. He is currently registered with this Department.

This disciplinary proceeding was commenced by the verification of a petition on March 1, 1960, and it contains two specifications of charges against the respondent. First, it is alleged that he was guilty of fraud or deceit in the practice of medicine within the meaning of Section 6514, subdivision 2(a) of the Education Law in that he submitted bills for medical services and medical reports which were false and fraudulent to I. Frank Miller, a lawyer, for use by him in connection with a claim of one Louis Kaminsky against the New York City Transit System and, further, that he submitted bills for services and medical reports which were false to the same attorney in connection with claims for personal injuries of George Turner, Doris Turner and Sadie Cohen as well as similar claims in personal injury matters relating to Mario Morales and Julio Gonzalez. Second, it was claimed that the respondent was guilty of unprofessional conduct within the meaning of paragraph (g) of the same section and subdivision of the Education Law in connection with the same facts set forth in the first specification.

A Subcommittee of the Medical Committee on Grievances was appointed to hear the charges against the respondent. A hearing was held on March 23, 1960, at which Dr. Wassermann appeared in person and by his attorney. He testified at length. The Subcommittee has submitted its report stating in detail its factual findings and concluding that the respondent is guilty of the charges contained in both specifications of the petition. It recommends that his license to practice medicine be revoked because he is not

fit to be intrusted with the responsibilities, duties and obligations of a practicing physician to the public. The Medical Committee on Grievances has voted to affirm the findings and recommendation of its Subcommittee.

The testimony and exhibits in evidence amply sustain the charges contained in the petition. Upon the whole record and after due deliberation we sustain the findings of the Medical Committee on Grievances. We hold unanimously that David Wassermann is guilty of fraud or deceit in the practice of medicine within the meaning of Section 6514, subdivision 2(a) of the Education Law and that he is guilty of unprofessional conduct within paragraph (g) of the same section and subdivision of the Education Law. We are of firm conviction that the facts reported herein constitute a case for revocation of authorization and license to practice as a physician heretofore granted to David Wassermann. We therefore recommend that such license be revoked.

Respectfully submitted,

ALEXANDER J. ALLAN, JR.
GEORGE L. HUBBELL, JR.
CHESTER H. LANG
By /s/ ALEXANDER J. ALLAN, JR.
Chairman

Dated September 13, 1960

Report of Regents' Committee

CERTIFICATE OF SECRETARY
DEPARTMENT OF EDUCATION
STATE OF NEW YORK

COMMITTEE ON GRIEVANCES

In the Matter of the Application for the revocation of the authorization and license heretofore granted to

DR. DAVID WASSERMANN

to practice as a physician in the State of New York, and for the cancellation of his registration as such, and for such other relief as the premises warrant.

To the Board of Regents:

I, the undersigned, Secretary of the COMMITTEE ON GRIEVANCES duly appointed pursuant to the Education Law of the State of New York, do hereby certify:

1. That charges, in writing, were duly preferred and filed against DR. DAVID WASSERMANN a duly licensed physician of the State of New York, hereinafter referred to as respondent, wherein respondent was charged with being guilty of fraud or deceit in the practice of medicine and with being guilty of unprofessional conduct in the practice of medicine within the purview of Section 6514, subdivision 2(a) and 6514, subdivision 2(g) of the said Education Law, and a copy of the said charges with notice of hearing were duly served upon the respondent, and hearing duly had thereon before a subcommittee of the COMMITTEE ON GRIEVANCES which found DR. DAVID WASSERMANN guilty of the charges as set forth in its written report containing its

findings, determination and recommendation as presented and filed with the COMMITTEE ON GRIEVANCES.

2. That the findings, determination and recommendation of the said subcommittee on the aforesaid charges against DR. DAVID WASSERMANN, the respondent herein, were made the findings, determination and recommendation of the COMMITTEE ON GRIEVANCES on May 5, 1960 except as may be hereinafter modified, if any, which unanimously determined that the respondent was guilty of the charges to the extent above found.

3. That it recommended to the Department of Education that for respondent's misconduct as hereinbefore found, his license be revoked and that the entire record of the proceedings herein be duly certified by the Secretary, and transmitted to the Board of Regents.

I FURTHER CERTIFY THAT the vote of the COMMITTEE ON GRIEVANCES on the said report containing the findings, determination and recommendation as to the charges against: DR. DAVID WASSERMANN was as follows and the vote was so recorded:

RECORD OF VOTE

Member	Recommendation	Vote
DR. C. GORHAM BECKWITH	Revocation	Guilty
DR. HENRY W. EISFELDER	"	"
DR. HERBERT E. WELLS	"	"
DR. JAMES C. POTTER	"	"
DR. LAWRENCE AMES	"	"
DR. WILLIAM T. BOLAND	"	"
DR. IRVING L. ERSHLER	"	"
DR. WILLIAM L. WHEELER, JR.	"	"
DR. ALFRED A. SCHENONE	"	"
DR. HENRY E. MCGARVEY (Died November 8, 1959—vacancy caused by such death unfilled as of the time of this meeting.)		

Report of Regents' Committee

I FURTHER CERTIFY that annexed hereto is a true copy of the record and proceedings taken herein, as follows:

1. Transcript of the Minutes
2. Report, Findings and Recommendation of the sub-committee
3. Exhibits

All of which is respectfully and unanimously submitted.

Dated: 5th day of May, 1960.

(sgd.) DR. LAWRENCE AMES,
Secretary.

CONCLUSION

We find that the charges against the respondent, as above set forth, have been sustained by sufficient legal evidence. We accordingly recommend that the respondent's license to practice medicine in the State of New York be revoked.

Dated: New York, New York
5 day of May, 1960.

.....
Dr. William T. Boland, Chairman

.....
Dr. C. Gorham Beckwith

.....
Dr. Alfred A. Schenone

Report of Findings, Determination and Recommendation of Sub-Committee on Grievances

DEPARTMENT OF EDUCATION
STATE OF NEW YORK

COMMITTEE ON GRIEVANCES

In the Matter of the Application for the Revocation of the authorization and license heretofore granted to

DR. DAVID WASSERMANN

to practice as a physician in the State of New York, and for the cancellation of his registration as such, and for such other relief as the premises warrant.

To the Committee on Grievances

The undersigned, subcommittee of the COMMITTEE ON GRIEVANCES duly designated to hear the charges against DR. DAVID WASSERMANN hereinafter referred to as Respondent, pursuant to Section 6515 of the Education Law of the State of New York, and to report its findings, determination and recommendation in respect to the said charges, do hereby, after due deliberation, unanimously report its findings, determination and recommendation as provided by law, as follows:

RECORD OF PROCEEDINGS

Petition containing charges verified: March 1, 1960
Notice of hearing upon charges returnable: March 23, 1960
Place of hearing: 2 West 45th Street (16th floor), New York City, New York

Report of Findings, Determination and Recommendation of Sub-Committee on Grievances

Respondent served with copy of notice of hearing and charges: March 1, 1960

Answer of respondent verified and filed: March 17, 1960 March 18, 1960

Petitioner appears by Louis J. Lefkowitz, Attorney General of the State of New York by Meyer H. Mencher, Assistant Attorney General

Respondent appears in person and by his attorney: Reed B. Dawson, Esq. 355 Lexington Avenue, New York 17, New York

Respondent's present address: 285 West End Avenue, New York City, New York

Hearing held on: March 23, 1960

FINDINGS OF SUBCOMMITTEE

1. The caption of the papers in these proceedings spell the name of the respondent as "Dayid Wasserman" with only one "n". When the respondent took the stand he spelled his name "Wassermann" with two "n's". We are advised that Reed B. Dawson, Esq., attorney for the respondent, has advised the Attorney General that respondent's name is spelled with two "n's." It further appears that when the respondent last registered he spelled his name with two "n's."

2. Dr. David Wassermann, the respondent herein, was graduated from the University of Illinois in 1937 and thereafter and on or about January 27, 1938 he received license No. 34653 from the New York State Department of Education which authorized him to practice medicine in the State of New York.

3. Respondent is currently registered to practice medicine in the State of New York with the New York State

Education Department from premises at 285 West End Avenue, in the Borough of Manhattan, County, City and State of New York.

4. Respondent was charged in these proceedings with fraud or deceit in the practice of medicine in that he issued false and fraudulent bills and medical reports; and with unprofessional conduct in the practice of medicine in that he had entered into an agreement with an attorney under which the attorney would refer patients to the respondent and the respondent would issue false and fraudulent bills and medical reports for such patients for the purpose of enhancing their claims for damages based upon the injuries referred to in said bills and reports.

From the evidence before us and from the admissions made by the respondent it appears that the respondent had issued medical bills and reports for; one Louis Kaminsky reciting ninety-one visits including ten spinal taps and X-rays for a total bill of $1,310; Doris Turner reciting a total of nineteen office visits and four house calls including X-rays for a total bill of $185; George Turner reciting nineteen office visits, four house calls and X-rays for a total bill of $195; Sadie Cohen reciting thirty-nine visits including three spinal taps and X-rays for a total bill of $530; Mario Morales reciting X-rays, house calls and office visits for a total bill of $202; and Julio Gonzalez reciting X-rays, house calls and office visits for a total bill of $141.

Louis Kaminsky testified that he had visited the respondent at his office definitely one time and not more than four times. He further testified that respondent had not taken any X-rays and that his entire examination consisted of feeling a lump on the witness' forehead above his left eye and that he had not paid any monies whatsoever to the respondent. Respondent admitted that he had only seen Kaminsky a few times and that he had never received the sum of $1,310 in payment for his bill although the bill re-

cited that he had been paid that sum by the patient. Doris Turner testified that she did not know the respondent, had never seen him; that he had never made a house call to her home to herself or her husband on the date set forth in the bill and had never visited his office in New York; and had never been treated by the respondent. She further testified that she had never been X-rayed prior to the year 1956. She further testified that her mother had never been visited by the respondent thirty-nine times as recited in the bill issued by him and that neither she, her husband nor her mother had suffered from the injuries recited in the medical report issued by the respondent. The respondent testified that he had made one or two house calls to Mr. and Mrs. Turner and Mrs. Cohen. Mario Morales testified that he had visited a doctor on West End Avenue but could not recognize the respondent as being the doctor whom he had visited. He testified that he had seen this doctor three or four times, and had not sustained any marks on his face or cuts on his arms as recited in the medical report furnished by the respondent. He further testified that Julio Gonzalez had been involved in the same accident with him and that there were no marks on Mr. Gonzalez' face as a result of the accident as recited in respondent's medical report. Each of the medical reports and bills hereinbefore referred to had been sent to the insurance companies respectively involved either directly by I. Frank Miller, the attorney retained by these patients who had referred the patients to the respondent, or directly by the respondent.

In an attempt to explain his actions the respondent testified that beginning in approximately 1952 he had arranged with the attorney I. Frank Miller to send patients to him who had been involved in accidents; that he would examine the patients and submit bills and medical reports to the attorney. He further testified that the attorney had agreed, due to the fact that the respondent had no secre-

tarial help available, to type the medical reports and bills for him and that he, the respondent, had furnished to the attorney blank sheets of his stationery and letterheads. He stated that he had known the attorney for approximately twenty-five years and had relied upon the attorney's honesty and integrity and that when the attorney would come to him late in the evening at about 10:30 or 11:00 o'clock while he was having his dinner he would sign the papers the attorney submitted to him without checking the correctness of the facts contained therein. He stated that his records were kept at the office and not at his home, and, therefore, could not make an accurate check of the contents of the bills against his records. He further stated that when the attorney would submit these papers to him they would be partially covered so that he would not see the total contents of the documents.

An examination of the evidence before us shows that the respondent had signed each of the bills and reports in evidence immediately below the last line and specifically one of the bills issued by the respondent for Louis Kaminsky was signed by him at the very bottom of the page. Approximately one-half inch above his signature appear the words "THIRTEEN HUNDRED AND TEN DOLLARS." The other bill in the Kaminsky case was also signed by the respondent not more than one inch below the figures "$1,310.00." It is inconceivable that the respondent did not see these totals as well as the totals shown on the other bills in evidence at the time he signed them and we, therefore, cannot accept his explanation with regard thereto.

The record before us further indicates that the respondent had entered into a course of dealing with the attorney I. Frank Miller in 1951 which continued through 1957. During that period of time the respondent had issued medical bills and reports in not less than thirty-one cases for patients who had been referred to him by the attorney and that the medical bills and reports were prepared by the attorney

and signed by the respondent in the same manner as the bills and reports in evidence. It is apparent that this course of dealing and manner of doing business arose out of and was in furtherance of an agreement between respondent and the attorney whereby the attorney would refer his clients to the respondent and that the respondent would issue false and fraudulent medical bills and reports for the purpose of enhancing said clients' claims for compensation arising out of the injuries for which the respondent allegedly had rendered treatment. We feel that such conduct cannot be condoned and that the issuance of the false and fraudulent bills and medical reports by the respondent, epecially in the manner in which it was done, evinced a complete disregard by the respondent of his duties and obligations as a physician and constitutes the fraudulent practice of medicine and unprofessional conduct.

On the entire record we, therefore, conclude that the respondent is guilty of fraud or deceit in the practice of medicine within the purview and meaning of Section 6514, subdivision 2(a) of the Education Law of the State of New York; and is guilty of unprofessional conduct in the practice of medicine within the purview and meaning of Section 6514, subdivision 2(g) of the Education Law of the State of New York.

5. In considering the measure of discipline to be recommended in this case we have taken into consideration the character testimony in the form of letters submitted by the respondent. In view of the gravity of the charges against the respondent and the proof adduced in support thereof, we feel that the respondent is not fit to be entrusted with the responsibilities, duties and obligations of a practicing physician to the public.

Laws Involved

CONSTITUTION OF THE UNITED STATES

U. S. C. A. CONST. AMEND. 14, SEC. 1, PP. 3-4

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

• • •

NEW YORK STATE EDUCATION LAW

Section 211—16 McKinney Laws, Pt. 1, p. 71.

"§ 211. SUPERVISION OF PROFESSIONS.

1. Conformably to law the regents may supervise the entrance regulations to and the licensing under and the practicing of the professions of medicine, dentistry, nursing, veterinary medicine, pharmacy, optometry and podiatry, and also supervise the certification of public accountants, shorthand reporters, architects, engineers, surveyors and members of any other profession which may hereafter come under the supervision of the board of regents. Hearings by the regents under disciplinary proceedings pursuant to the provisions of this chapter relating to such professions may be given by or before not less than three members of the regents or by three persons, one of whom may be a member of the regents who shall serve without compensation, in each case to be designated by the regents or by the chancellor of the university to hold such hearings, but any

decision or determination in such proceedings shall be made by the regents. Hearings shall be upon the record before the grievance committee, or before the board of examiners of those professions wherein no grievance committee is specifically provided by law. The regents' committees conducting such hearings shall render a written report to the regents, including a statement as to the findings of fact and the evidence together with their recommendations, and the regents, without further hearing, shall in their discretion execute an order accepting or changing the determination of the grievance committee or board of examiners. The regents may in their discretion suspend the execution of a determination of censure and reprimand or suspension or revocation of the license of a practitioner and place such practitioner on probation subject to his compliance with conditions which the regents may determine. Members of the regents' committee shall be entitled to receive their necessary travel expenses together with fifty dollars per day for each day actually spent in conducting such hearings. As amended L. 1956, c. 225; L. 1958, c. 180, eff. March 13, 1958."

* * *

Section 6501—16 McKinney Laws, Pt. 3, p. 90.

"Section 6501. DEFINITIONS.

* * *

4. The practice of medicine is defined as follows: A person practices medicine within the meaning of this article, except as hereinafter stated, who holds himself out as being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition, and who shall either offer or undertake, by any means or method, to diagnose, treat, operate or prescribe for

any human disease, pain, injury, deformity or physical condition."

• • •

Section 6514—16 McKinney Laws, Pt. 3, p. 128.

"Section 6514. REVOCATION OF CERTIFICATES; ANNULMENT OF REGISTRATIONS.

• • •

2. The license or registration of a practitioner of medicine, osteopathy or physiotherapy may be revoked, suspended or annulled or such practitioner reprimanded or disciplined in accordance with the provisions and procedure of this article upon decision after due hearing in any of the following cases:

(a) That a physician, osteopath, or physiotherapist is guilty of fraud or deceit in the practice of medicine, osteopathy or physiotherapy • • •

• • •

(g) That a physician is or has been guilty of unprofessional conduct. The regents shall have power to promulgate rules to give effect to this section.

• • •"

Section 6515—16 McKinney Laws, Pt. 3, p. 137.

"Section 6515. (NOTE: As it provided at time of hearing of charges against petitioner in 1960.) PROCEDURE IN DISCIPLINARY PROCEEDINGS AGAINST A PHYSICIAN OR OSTEOPATH.

1. The committee on grievances shall be continued. Such committee shall consist of ten members who shall be appointed by the regents. The term of office of each of such members of such committee shall be five years. The terms of office of two

members shall expire each year. In the case of vacancy at any time by resignation, death or otherwise in the membership of the committee, such vacancy shall be filled for the unexpired term in the same manner as provided for the original selection of such member.

2. Any duly incorporated state medical or osteopathic society having two hundred or more members may nominate candidates for members of such committee, not to exceed three nominations for each member of such committee to which such society shall be entitled hereunder. When the candidates are so nominated the regents shall appoint for the terms specified herein as they shall determine, such members of such committee, so that such committee shall consist of four members who have been duly nominated by the Medical Society of the State of New York, two members by the New York State Homeopathic Society, one member by the New York State Osteopathic Society, and the regents upon their own nomination shall appoint three members of conspicuous professional standing. Each member of such committee shall be a duly licensed physician of this state.

3. The members of such committee shall serve during their appointed terms and until their successors are designated by the regents. They shall meet annually during the month of January for the purpose of organizing by the election of a chairman and a secretary of the committee, and shall meet at such times as the chairman shall designate.

4. The members of such committee shall have jurisdiction to hear all charges against duly licensed physicians, osteopaths and physiotherapists of this

state for violation of the provisions of section sixty-five hundred fourteen hereof, except subdivision one, and upon such hearing such committee shall determine such charges upon their merits, and the department may, after due notice and hearing, upon the receipt from such committee of the record, findings and determination of such committee wherein and whereby such practitioner has been found guilty, revoke and annul his license, annul his registration, suspend him from practice, or reprimand or otherwise discipline him. Proceedings against any practitioner under this section shall be begun by filing a written charge or charges against the accused. Such charges may be preferred by any person, corporation or public officer, and they shall be filed with the secretary of the committee on grievances and such secretary shall forward to the executive officer of the department a copy of such charges in all cases in which such committee or a subcommittee thereof shall deem a trial necessary. The chairman of such committee, when charges are preferred, may designate three or more of the members of such committee, including, whenever possible, at least one member who represents the same school of practice as the physician, osteopath or physiotherapist, against whom the charges are preferred to hear and report upon such charges to such committee. The time and place of the hearing of such charges shall be fixed by the secretary of the committee as soon as convenient and a copy of the charges, together with a notice of the time and place when they will be heard shall be served upon the accused or his counsel at least ten days before the date actually fixed for such hearing. Where personal service or service upon counsel after due diligence

cannot be effected and such fact is certified on oath by any person duly authorized to make legal service, the secretary of the committee shall cause to be published for four times at least thirty days prior to the hearing, a notice of the hearing in a newspaper published in the county in which the physician, osteopath or physiotherapist was last known to practice, and a copy of such notice shall also be mailed to the accused at his last known address. All such notices of hearing of charges shall contain a plain and concise statement of the material facts without unnecessary repetition, but not the evidence by which the charges are to be proved with a notification that a stenographic record of such proceedings will be kept, and that the accused will have opportunity to appear either personally or by counsel at the hearing, with the right to produce witnesses and evidence upon his own behalf, to cross-examine such witnesses, to examine such evidence as may be produced against him and to have subpoenas issued by the committee. Such subcommittee to whom such charges were referred shall make a written report of findings and recommendations and the same shall be forthwith transmitted to the secretary of the committee on grievances, with a transcript of the evidence. Said grievance committee may thereupon act upon such recommendation as it shall deem fit, or may take further testimony if the same shall seem desirable in the interest of justice. Thereupon the committee shall determine such charges upon their merits (the vote of each member of such committee to be recorded as part of the committee's findings). If by unanimous vote the practitioner is found guilty of such charges or any of them, the committee shall transmit to the department the record, findings and determination wherein and whereby such

practitioner has been found guilty, and their recommendation, and the regents after due hearing shall in their discretion execute an order accepting or modifying such determination of the committee as hereinabove provided. If the practitioner is found not guilty, the committee shall order a dismissal of the charges, and the exoneration of the accused.

Nothing herein contained shall estop the department from initiating proceedings in any case.

5. Any licensed practitioner found guilty under the provisions of this section, or whose license is otherwise revoked or suspended or registration annulled, or who has been refused registration, or who is otherwise reprimanded or disciplined under this article may institute a proceeding under article seventy-eight[1] of the civil practice act for the purpose of reviewing such determination returnable before the appellate division of the third judicial department, but no such determination shall be stayed or enjoined except upon application to such appellate division, after notice to the attorney-general. The committee on grievances or any member thereof may issue subpoenas and administer oaths pursuant to section sixty-one of the public officers law in connection with any hearing or investigation under this article and it shall be the duty of such committee to issue subpoenas at the request of and upon behalf of the defense. The committee on grievances shall not be bound by the laws of evidence in the conduct of its proceedings, but the determination shall be founded upon sufficient legal evidence to sustain the same. The department shall furnish legal advice and assistance to the committee whenever such service is requested.

* * *

9. Should, for any reason, three or more members of the committee be disqualified from participating in the hearing and decision of any case, or be for other reason

unable to participate therein their places may be temporarily filled for the purpose of determining the case to be heard by the remaining members of the committee nominating twice the number of candidates for such vacancy from whom there shall be selected by the chairman of the committee, after notice to the respective parties, the necessary number of members to constitute a quorum. A quorum of the committee shall consist of six members.

10. Such committee shall have power to make such rules and regulations for the conduct of its business as it shall deem necessary, provided such rules and regulations do not conflict with any of the provisions of this article.

11. The committee shall have power, where a proceeding has been dismissed, either on the merits or otherwise, to relieve the accused from any possible odium that may attach by reason of the making of charges against him, by such public exoneration as it shall see fit to make if requested by the accused so to do. As amended L. 1953, c. 249, eff. March 26, 1953."

Appellate Division Order Denying Leave to Appeal

At a Term of the Appellate Division, Supreme Court, State of New York, Third Judicial Department, held at the County Court House in the City of Albany, New York, commencing on the 13th day of November, 1961.

Present:

Hon. Francis Bergan,
Presiding Justice.

Hon. William H. Coon,
Hon. James Gibson,
Hon. J. Clarence Herlihy,
Hon. Donald S. Taylor,
Associate Justices.

Order No. 2945

In the Matter of the Application

of

Dr. David Wassermann,
Petitioner-Appellant,

For an Order pursuant to Article 78 of the Civil Practice Act,

against

The Board of Regents of the University of the State of New York,
Respondent.

The above-named petitioner having served and filed his notice of motion upon the annexed affidavit of Arnold

Ostwald, verified the 28th day of September, 1961, seeking leave to appeal to the Court of Appeals from an order of this Court, entered the 10th day of July, 1961, and served the 15th day of September, 1961, and petitioner having submitted a brief in support of such motion; and the respondent having duly served and filed an affidavit of Robert W. Bush, Assistant Attorney General of the State of New York, in opposition to the motion, and a letter of Robert W. Bush, dated October 13, 1961, having been filed with the Court; and the issues raised having come on for disposition before this Court, and due deliberation having been had thereon, and the Court having rendered its unanimous memorandum decision on or about the 16th day of November, 1961, denying permission to appeal to the Court of Appeals, without costs.

Now, on motion of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for respondent, it is

ORDERED, that permission to appeal to the Court of Appeals be and the same is hereby unanimously denied, without costs.

/s/ JOHN J. O'BRIEN,
Clerk.

A TRUE COPY

ENTERED: December 6, 1961.
/s/ JOHN J. O'BRIEN,
Clerk.

Motion for Leave to Appeal to Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK

In the Matter of the Application

of

DR. DAVID WASSERMANN,

Petitioner-Appellant,

For an Order pursuant to Article 78 of the Civil Practice Act,

against

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondent-Respondent.

ORDER TO SHOW CAUSE

Upon the annexed affidavit of Arnold Ostwald, sworn to December 19, 1961, the annexed order of the Supreme Court, Appellate Division, Third Department, entered December 14, 1961, with notice of entry thereof, denying the petitioner-appellant's motion for leave to appeal to the Court of Appeals, the order of the Appellate Division, Third Department, entered July 10, 1961, with notice of entry thereof, and upon all the proceedings heretofore had herein, it is

ORDERED, that the respondent-respondent show cause at a Term of the Court of Appeals of the State of New York to be held at the Courthouse, Albany, New York, on the 8th day of January, 1962, at 2:00 o'clock in the afternoon, or as soon thereafter as counsel can be heard, why an order should not be made granting leave to appeal to the Court

of Appeals from the aforesaid order of the Appellate Division, Third Department, entered July 10, 1961, on the ground that there are questions of law in this proceeding which ought to be passed on by the Court of Appeals, as more fully set forth in the annexed affidavit and in the brief to be submitted therewith on behalf of the petitioner-appellant, and on the further ground that the interests of substantial justice require the granting of leave to appeal, and why the respondent-respondent should not be stayed from proceeding under the said order of the Appellate Division, Third Department, entered on July 10, 1961, pending the hearing and determination by this Court of the aforesaid motion by the petitioner-appellant for leave to appeal from the said order, and in the event the said motion is granted, pending the hearing and determination by this Court of the appeal, and why such other and further relief should not be granted as to this Court may seem just and proper, and it is further

ORDERED, that the respondent-respondent be and they hereby are stayed from all proceedings under the said order of the Appellate Division, Third Department, entered July 10, 1961, until the hearing and determination of this application for a stay.

Sufficient reason appearing therefor, it is further

ORDERED, that service of a copy of this order together with the papers upon which it is granted made upon the Attorney General of the State of New York, attorney for the respondent-respondent, prior to 5:00 P.M. on the 21st day of December, 1961, shall be sufficient service thereof.

Dated: New York, New York, December 20, 1961.

STANLEY H. FULD,
Judge of the Court of Appeals
of the State of New York.

Affidavit of Arnold Ostwald in Support of Motion for Leave to Appeal

COURT OF APPEALS

STATE OF NEW YORK

In the Matter of the Application

of

DR. DAVID WASSERMANN,

Petitioner-Appellant,

For an Order pursuant to Article 78 of the Civil Practice Act,

against

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondent-Respondent.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ARNOLD OSTWALD, being duly sworn, deposes and says:

1. I am an attorney at law and the attorney for the above named petitioner-appellant on this motion for leave to appeal to the Court of Appeals from an order entered in the office of the Clerk of the Supreme Court, Appellate Division, Third Department, on July 10, 1961, which order unanimously confirms the final determination of the Board of Regents revoking the petitioner-appellant's license to practice medicine in the State of New York.

Affidavit of Arnold Ostwald

2. This is a proceeding under Article 78 of the Civil Practice Act and Section 6515 of the Education Law brought by the petitioner-appellant to review a final determination of the Board of Regents of the State of New York made on or about September 30, 1960, and the order of Ewald B. Nyquist, Acting Commissioner of Education of the State of New York, entered thereon on October 31, 1960, in which it was ordered that the petitioner-appellant's license to practice medicine in the State of New York be revoked and that his registration as a physician be canceled of record. The Appellate Division of the Supreme Court, Third Department, unanimously upheld the said final determination and order in a decision handed down March 21, 1961. The order of the Appellate Division, Third Department, to be appealed from was entered thereon in the office of the Clerk of that Court on July 10, 1961, and was served upon the then attorney for the petitioner-appellant on September 18, 1961. Copies of the said decision and order with notice of entry are annexed to and made part of this affidavit. The petitioner-appellant's motion in the Appellate Division, Third Department, for leave to appeal from the said order entered July 10, 1961 was denied in a decision handed down November 16, 1961 and an order entered thereon December 14, 1961. A copy of the said order of the Appellate Division, Third Department, denying leave to appeal to the Court of Appeals with notice of entry was served upon the attorney for the petitioner-appellant on December 18, 1961 and is annexed hereto.

3. The petitioner-appellant was charged with fraud or deceit in the practice of medicine under Section 6514, subdivision 2(a) of the Education Law, in that he submitted to an attorney false medical reports and false bills to assist the attorney in making false claims for personal injuries. Petitioner-appellant was also charged with unprofessional conduct in the practice of medicine under Section 6514,

subdivision 2(g) of the Education Law in that he conspired with the same attorney to make the same said false medical reports. A subcommittee of the Medical Grievance Committee conducted hearings and found the petitioner-appellant guilty of both charges. The Committee on Grievances and the Regents' Committee on Discipline unanimously confirmed the findings of the sub-committee, and the petitioner-appellant's license to practice medicine was revoked. A stay of the revocation was in effect during the pendency of this proceeding in the Appellate Division, Third Department, and during the pendency in the said court of the petitioner-appellant's motion for leave to appeal to the Court of Appeals. The petitioner-appellant now seeks a further stay during the pendency in the Court of Appeals of this motion for leave to appeal and, if this motion is granted, during the pendency of the appeal.

4. The petitioner-appellant has previously contended before the Appellate Division that the findings and determination of the Committee on Grievances were not justified by the evidence adduced at the hearing and that the Committee's recommendation for revocation was not justified under the circumstances. The Appellate Division held, however, that there was ample evidence in the record to sustain the determination and that the severe penalty imposed upon the petitioner-appellant did not constitute an abuse of discretion. For the purposes of this appeal the petitioner-appellant accepts the holdings of the Appellate Division, but he respectfully asks this Court to focus its attention upon the question of the applicability of Education Law, Section 6514, subdivisions 2(a) and 2(g) to a physician who has made false medical reports for use by a lawyer in the settlement of personal injury claims. While the opinion of the Appellate Division deals only with the questions of fact, the petitioner-appellant seeks this Court's leave to

appeal so that the Court of Appeals may primarily consider the following points of law:

I. A physician who makes false medical reports for use by a lawyer in connection with personal injury claims is not then engaged "in the practice of medicine" within the applicable definition contained in Section 6501, subdivision 4 of the Education Law. A physician who so misconducts himself cannot, therefore, be disciplined for having been guilty of fraud or deceit in the practice of medicine under Section 6514, subdivision 2(a). Such misconduct is committed outside the practice of medicine, as defined in the statute, or, at most, it is peripheral or ancillary thereto.

II. The catch-all "unprofessional conduct" provisions of subdivision 2(g) also cannot be used to discipline a physician for having made false medical reports to a lawyer in connection with personal injury claims:

(a) To do so would unlawfully enlarge the cause for disciplinary action specifically provided by subdivision 2(a) so as to extend it to fraud or deceit other than in the practice of medicine.

(b) The term "unprofessional conduct" as used in subdivision 2(g) is of general import and of uncertain meaning. Under the doctrines of *noscitur a sociis* and *ejusdem generis* this term must therefore be confined to the specific subject matters set forth in the other subdivisions of Section 6514 as grounds for disciplinary action.

(c) The Department of Education Regulations defining unprofessional conduct (Section 30, subdivision 4) also do not include the making of false medical reports for use by a lawyer in personal

injury claims among the acts of misconduct for which a physician may be disciplined under Section 6514. Subdivision 4(i) of these regulations declares that a physician who makes false *required* reports is guilty of unprofessional conduct and thus specifically excludes the voluntary making of false *non-required* reports such as those with which the petitioner-appellant is charged from the scope of disciplinary power under the rule of *expressio unius est exclusio alterius.*

(d) The Legislature has enumerated specific causes for disciplinary action in subdivision 1 and subdivisions 2(a) through (f) of Section 6514. The Department of Education has enumerated additional specific causes by defining unprofessional conduct in its Regulations, Section 30, subdivisions (a) through (k). To permit the Board of Regents to create additional unenumerated causes for disciplinary action under the catch-all "unprofessional conduct" provision would render all of the specific enumerated causes in the statute and in the Regulations entirely meaningless.

III. Not every act of misconduct on the part of a physician may be made the subject of disciplinary action by the Board of Regents in the first instance under the powers delegated to it by Section 6514. Misconduct other than directly in the practice of medicine and other than expressly specified in the Staute or in the Regulations may in the first instance be made the subject of criminal prosecution and, if a conviction is obtained, the physician may then be disciplined under the provisions of subdivisions 1 and 2(b) of Section 6514.

5. While the Appellate Division did not specifically address itself to any of these questions of the statutory authority for disciplinary action against the petitioner-appellant, a finding of the existence of such statutory authority is necessarily implicit in its decision.

6. As will be shown in the brief, the petitioner-appellant's foregoing points of law raise important issues concerning the construction of the legislative provisions for disciplinary action against physicians. These points have not previously been decided by the Court of Appeals. Upon information and belief, the revocation of a physician's license for unprofessional conduct under subdivision 2(g) has never been previously reviewed in the courts and this subdivision has not previously been interpreted by the Court of Appeals. The courts have never applied or interpreted the definition of the practice of medicine contained in Section 6501, subdivision 4, in any disciplinary proceeding.

7. The charges against the petitioner-appellant arose out of the so-called Arkwright or Brooklyn ambulance chasing investigation. Upon information and belief, the petitioner-appellant is one of at least seventeen physicians who have been disciplined on similar charges arising out of the same investigation. Upon information and belief, disciplinary proceedings against a great many other physicians are presently pending on like charges of having made false medical reports for use by lawyers in connection with personal injury claims. The petitioner-appellant is the first to seek the ruling of the Court of Appeals on the applicability of Education Law, Section 6514, subdivisions 2(a) and 2(g) and the regulations promulgated thereunder to the making of false medical reports in connection with personal injury claims. The questions presented on this motion for a full review by the Court of Appeals are therefore

not only distinguished by their absolute novelty but also by the grave importance to the matters at issue. The petitioner-appellant has been permanently deprived of his livelihood and of his profession and a great many other physicians have suffered like or similar severe punishment through administrative action taken on alleged statutory authority which has never been interpreted by the Court of Appeals.

8. In support of the petitioner-appellant's application for a further stay of the order revoking his license to practice medicine during the pendency of this motion and, if the same is granted, during the pendency of this appeal, it is respectfully urged that the petitioner-appellant is not charged with any misconduct affecting any patient, that he has had an exemplary and unblemished record in his professional relations with his patients, that he has never previously been charged with any misconduct, that a like stay has been in effect during the pendency of the proceedings in the Appellate Division and, finally, that the denial of such a stay would cause the petitioner-appellant to suffer irreparable injury in the event this motion is granted or in the event the order sought to be stayed is reversed on appeal.

9. No previous application for leave to appeal to the Court of Appeals has been made, except as hereinabove set forth.

ARNOLD OSTWALD.

Sworn to before me this
19th day of December, 1961.

ISRAEL LEFRAK, Notary Public, State of New York,
No. 24-2297200
Qual. in Kings Co.
Commission Expires March 30, 1963

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

COURT OF APPEALS

STATE OF NEW YORK

In the Matter of the Application

of

DR. DAVID WASSERMANN,
Petitioner-Appellant,

For an Order pursuant to Article 78 of the Civil Practice Act,

against

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,
Respondent-Respondent.

* * *

In essence, Dr. Wassermann's position is that he has been permanently deprived of his profession and of his livelihood without the protection of ordinary constitutional safeguards under statutes and regulations delegating the power of such drastic administrative action to the Department of Education, even though these statutes and regulations, on their face, do not extend to and plainly exclude from their scope the acts of misconduct with which he is charged.

* * *

A plenary review of this case by the Court of Appeals is necessary not only so that this Court may rule on the important and altogether novel questions of law outlined above, but also because of the grave consequences of the

Department of Education's action. Dr. Wassermann has been deprived of his profession and of his livelihood without the protection of the rules of evidence and of ordinary constitutional safeguards * * *

* * *

The Question Presented

Should the power of the Department of Education to discipline physicians *without the protection of ordinary constitutional safeguards* delegated to it by statute be extended to permit a physician to be deprived of his profession and of his livelihood for alleged acts of misconduct which are outside the scope of such statutory delegation and which are not included among the definitions of "unprofessional conduct" contained in the Department's own regulations? (italics supplied)

* * *

Point III of this brief will set forth and discuss the statutory provisions under which administrative disciplinary action may be taken against a physician who is charged with the acts of misconduct which are involved in this case and under which Dr. Wassermann can be disciplined without the denial of due process of law if sufficient evidence against him is presented. * * *

* * *

Brief in Support of Motion for Leave to Appeal to the Court of Appeals

POINT I

The revocation of Dr. Wassermann's license for fraud or deceit in the practice of medicine under Education Law, Section 6514, subdivision 2(a), constitutes an unlawful extension of disciplinary power, because the making of false medical reports and the supplying of false bills to assist an attorney in the disposition of personal injury claims are acts not done in the practice of medicine within the definition of Section 6501, subdivision 4.

* * *

POINT II

The revocation of Dr. Wassermann's license for unprofessional conduct under Education Law, Section 6514, subdivision 2(g) constitutes an unlawful extension of disciplinary power, * * *

* * * The charge that Dr. Wassermann is guilty of unprofessional conduct is therefore also insufficient in law. The revocation of his license on this ground also constitutes an unlawful extension of the disciplinary powers delegated to the Department of Education.

* * *

The Department of Education is not authorized to take away a physician's license on grounds of alleged misconduct which are not set out in the specifications of disciplinary grounds contained in Section 6514, subdivisions 2(a) through (g) * * *

* * *

Even if the Department of Education had included acts of fraud or deceit not in the practice of medicine among its regulatory definitions of unprofessional conduct, such inclusion would have been an unlawful enlargement of the power to discipline physicians for fraud or deceit in the

practice of medicine specifically delegated in Section 6514, subdivision 2(a). * * *

* * *

* * * The respondent further prejudiced Dr. Wassermann's case by arguing falsely that he could have typewritten the medical reports in question, since a document (Exhibit D), allegedly typewritten by him, was in the record. In fact this document had been written out by Dr. Wassermann in longhand, as the respondent finally admitted after the argument before the Appellate Division in his letter of February 10, 1961.

* * *

* * * The legislature may enlarge the disciplinary powers of the Department of Education by amending Section 6514 so as to empower it to hear and determine also charges of misconduct committed not in the practice of medicine, but since this has not yet been done, the action taken against Dr. Wassermann constitutes an unlawful extension of the powers of the Department of Education.

* * *

The protection of Dr. Wassermann's most valuable property, the right to practice his profession, to which he is entitled under the Federal and State Constitutions, demands that he be not deprived of it without due process of law and that the Department of Education's powers to take it away without affording him the ordinary constitutional safeguards be strictly construed and be limited to the express delegation contained in the statute.

* * *

BRIEF OF PETITIONER-APPELLANT

COURT OF APPEALS

STATE OF NEW YORK

In the Matter of the Application

of

DR. DAVID WASSERMANN,
Petitioner-Appellant,

For an Order pursuant to Article 78 of the Civil Practice Act,

against

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,
Respondent-Respondent.

* * *

POINT II

The Regents' Retroactive Application of Education Law, Section 6514, subdivision 2(g) and the regulations was improper, and vitiates their determination.

* * *

POINT III

The procedure provided by Education Law, Section 6515, was not complied with in that the committee on grievances did not, at the time of the finding of guilt, consist of ten members, and was, therefore, not legally constituted.

* * *

POINT IV

The determination under review violates appellant's rights under the Federal Constitution.

1. The proceedings herein were bottomed on an act which was unconstitutional.

(a) The act was unconstitutional by reason of the fact that it delegated legislative power or function to an administrative agency.

See: *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 55 S. Ct. 837 (1935), 1st paragraph, second column on page 846.

(b) The act was unconstitutional in that it failed to establish definite, precise and standard conduct or to define the nature, extent and the manner of interpretation thereof. Particularly, there is no understandable expression as to which acts, and the nature thereof, that are contemplated, are prohibited by the act in question.

See: *Larkin* v. *Consolidated Tel. & Elec. Subway Co.*, 193 Misc. 1001, 85 N. Y. S. 2d 631; *Wilner* v. *Department of Health*, 5 Misc. 2d 331, 159 N. Y. S. 2d 601.

2. The constitutional rights of Dr. David Wassermann were violated in that the hearing was not held in an impartial forum, but, on the contrary, was held in a forum:

(a) of the accusers' own selection,

(b) friendly to the accusers.

This is in violation of the law, as set forth in *Bender* v. *Board of Regents of University*, 262 App. Div. 627, 30 N. Y. S. 2d 779.

(c) The subject matter was precisely the interpretation of legal prohibitions partaking of the nature of questions of law. The interpretation of the legal questions required that it be done by people trained or educated in the law. The triers of fact in the instant case were not shown to have had the necessary qualifications.

3. The proof as to the filing of the rule was not established.

See: *People* v. *Calabro*, 7 Misc. 2d 732, 170 N. Y. S. 2d 876; *People* v. *Cull*, 26 Misc. 2d 668, 210 N. Y. S. 2d 10, aff'd 10 N. Y. 2d 123, 218 N. Y. S. 2d 38.

4. The foregoing, together with the other points made in this brief, such as the *ex post facto* application of certain provisions of law and the rules, constitute the deprivation of appellant's property without due process of law.

* * *

Court of Appeals Remittitur

COURT OF APPEALS
STATE OF NEW YORK } ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 5th day of April in the year of our Lord one thousand nine hundred and sixty-two, before the Judges of said Court.

WITNESSES:

The HON. CHARLES S. DESMOND,
Chief Judge Presiding.

RAYMOND J. CANNON, Clerk.

Remittitur April 5, 1962.

No. 58

In the Matter of the Application
of
DR. DAVID WASSERMANN,
Appellant,
For an Order, etc.,
vs.
THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,
Respondent.

BE IT REMEMBERED, that on the 13th day of February in the year of our Lord one thousand nine hundred and sixty-two Dr. David Wassermann, the appellant in this cause, came here unto the Court of Appeals, by John P. Weatherwax, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And the Board of Regents of the University of the State of New York, the respondent in said cause, afterwards appeared in said Court of Appeals by Louis J. Lefkowitz, Attorney General. Which said Notice of

Court of Appeals Remittitur

Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, the said Court of Appeals having heard this cause argued by Mr. F. Walter Bliss, of Counsel for the Appellant, and by Mr. Robert W. Bush, of Counsel for the Respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed without costs. And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, Third Judicial Department there to be proceeded upon according to law.

WHEREFORE, it is considered that the said order be affirmed, without costs, as aforesaid, and hereupon, as well, the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Third Judicial Department before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before the Justices thereof, &c.

/s/ RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

Court of Appeals, Clerk's Office
Albany, April 15, 1962.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(SEAL)

/s/ RAYMOND J. CANNON,
Clerk.

Motion to Amend Remittitur

COURT OF APPEALS.

STATE OF NEW YORK

In the Matter of the Application

of

DR. DAVID WASSERMANN,
Petitioner-Appellant,

For an Order pursuant to Article 78 of the Civil Practice Act,

against

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,
Respondent-Respondent.

Upon the annexed affidavit of John P. Weatherwax, sworn to on the 25th day of April, 1962, the Record on Appeal, the Briefs of the petitioner-appellant and the respondent-respondent filed in this Court in the above-entitled matter, the Decision and Opinion of this Court rendered in the above-entitled matter on the 5th day of April, 1962, the Remittitur thereon prepared as provided by law and upon all the proceedings heretofore had herein, it is

ORDERED that the respondent-respondent show cause at a Term of the Court of Appeals of the State of New York held at the Court of Appeals Building in the City of Albany, New York, on the 7th day of May, 1962 at two o'clock in the afternoon of that day or as soon thereafter as counsel can be heard why an order should not be made

amending the Remittitur herein by adding thereto the following:

> Upon the appeal herein there was presented to and necessarily passed upon by this Court questions under the Constitution of the United States, viz: the petitioner-appellant's contention that his rights to due process of law under the Fifth and Fourteenth Amendments of the Constitution of the United States were denied to him and that he is being deprived of his rights to practice medicine in the State of New York in violation thereof. That the Court of Appeals held herein that petitioner-appellant was not denied his constitutional rights and that there was no merit to petitioner-appellant's contentions,

and why such other and further relief should not be granted as to this Court may seem just and proper, and it is further

ORDERED that the respondent-respondent be and is hereby stayed from all proceedings under the order of the Appellate Division of the Supreme Court, Third Judicial Department, herein which was affirmed by this Court pursuant to its decision and opinion rendered on the 5th day of April, 1962; until a hearing and determination of this application, and it is further

ORDERED that service of a copy of this order together with the papers upon which it is granted made upon the Attorney General of the State of New York, attorney for the respondent-respondent, on the day of May, 1962 shall be sufficient and timely service thereof.

Dated: Albany, New York
April 27th, 1962.

s/ SYDNEY F. FOSTER
Judge of the Court of Appeals
of the State of New York

Affidavit of John P. Weatherwax in Support of Motion to Amend Remittitur

COURT OF APPEALS

STATE OF NEW YORK

In the Matter of the Application

of

DR. DAVID WASSERMANN,

Petitioner-Appellant,

For an Order pursuant to Article 78 of the Civil Practice Act,

against

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondent-Respondent.

STATE OF NEW YORK
COUNTY OF RENSSELAER } ss.:

JOHN P. WEATHERWAX, being duly sworn, deposes and says:

1. That he now is the attorney of record for the petitioner-appellant on his appeal to the Court of Appeals in the above entitled matter. That Hon. F. Walter Bliss is associated with deponent in the prosecution of the petitioner-appellant's appeal to this Court and presented the argument on behalf of petitioner-appellant to this Court on the 26th day of February, 1962.

2. That the respondent-respondent was represented in this Court upon such appeal by Louis J. Lefkowitz, Attorney General of the State of New York, Robert W. Bush, Assistant Attorney General, of Counsel.

3. That after due deliberation this Court rendered its decision in the above entitled matter and its opinion therein was filed on the 5th day of April, 1962.

4. That upon such appeal the petitioner-appellant presented and submitted to this Court his contentions that the order appealed from was for several reasons illegal and improper and further was in violation of his rights under the Constitution of the United States in that he was being deprived of his rights, viz: his right and license to practice medicine in the State of New York, without due process of law, as guaranteed him by the Fifth and Fourteenth Amendments of the Constitution of the United States.

5. That petitioner-appellant's contentions and the questions presented thereby are set forth in petitioner-appellant's brief submitted to this Court on such appeal to which reference is respectfully made. To summarize—

> POINT I submitted the contention that petitioner-appellant was not guilty, as a matter of law, of the charge of "fraud or deceit in the practice of medicine" or of the charge "unprofessional conduct therein", for the reason that no statute or regulation providing that the acts which petitioner-appellant was charged to have committed and for which his license to practice medicine in the State of New York was revoked by respondent-respondent, was in legal force and effect, further that the acts which he was alleged to have committed were not within the purview of the statute and regulation that the respondent-respondent contended to be applicable, thus his conviction of such acts and the resultant

punishment by respondent-respondent were without legal basis.

Point II submitted the contention that respondent-respondent's retroactive application of the Education Law, Section 6514, subdivision 2(g) and Regents Regulation 30, subdivision 4 were improper and not a legal basis to support the charges made against petitioner-appellant and a determination of his guilt thereon and the revocation of his license to practice medicine in the State of New York.

Point III submitted the contention that the Grievance Committee of the Board of Regents of the State of New York which found petitioner-appellant guilty of the charges made against him was not "legally constituted" and that therefore its acts respecting the petitioner-appellant were illegal and a nullity.

Point IV submitted the contention that the determination of the Board of Regents which resulted in petitioner-appellant being deprived of his license to practice medicine in the State of New York is in violation of the petitioner-appellant's rights under the Constitution of the United States in several respects, which are set forth in said Point to which attention is respectfully directed.

It is respectfully submitted that all of petitioner-appellant's contentions presented upon his appeal to this Court involved a constitutional question as to petitioner-appellant being deprived of his rights, viz: his right and license to practice medicine in the State of New York "without due process of law" as guaranteed him by the Fifth and Fourteenth Amendments of the Constitution of the United States.

6. That this Court in rendering its decision herein overruled all of the contentions and legal points pre-

sented by petitioner-appellant upon such appeal, and affirmed the order appealed from of the Appellate Division of the Supreme Court, Third Judicial Department. That while the decision of this Court stated that it had considered all of the issues presented by the petitioner-appellant it did not specifically state that questions under the Constitution of the United States were presented to and necessarily passed upon by the Court.

7. The remittitur upon this appeal has been prepared and is ready for filing according to law. The remittitur does not specifically state that questions under the Constitution of the United States were presented to and necessarily passed upon by this Court.

8. The petitioner-appellant deems that the decision of this Court in affirming the order appealed from is depriving him of his license to practice medicine within the State of New York, is in violation of his constitutional rights under the Constitution of the United States and that he has been deprived of such rights without due process of law as guaranteed by the Fifth and Fourteenth Amendments of the Constitution of the United States and accordingly desires to obtain a review of such decision by the United States Supreme Court through a writ of certiorari. Therefore, petitioner-appellant desires that the remittitur herein be amended to include therein the appropriate recitation with respect to the questions under the United States Constitution which were presented to and passed upon by this Court upon such appeal.

9. It is deemed by petitioner-appellant and his attorneys that the aforesaid application and review by the United States Supreme Court should be made as soon as possible and accordingly it is most important that this application be considered by this Court at its earliest convenience in

order that the appropriate and necessary procedural steps may be taken to obtain such contemplated review by the United States Supreme Court. Accordingly an order to show cause bringing this matter on for consideration is respectfully requested.

10. That no previous application has been made for the relief sought upon this application.

WHEREFORE, your deponent on behalf of the petitioner-appellant respectfully prays this Court to grant an order amending the remittitur herein by adding thereto the following

> Upon the appeal herein there was presented to and necessarily passed upon by this Court questions under the Constitution of the United States, viz: the petitioner-appellant's contention that his rights to due process of law under the Fifth and Fourteenth Amendments of the Constitution of the United States were denied to him and that he is being deprived of his rights to practice medicine in the State of New York in violation thereof. That the Court of Appeals held herein that the petitioner-appellant was not denied his constitutional rights and that there was no merit to petitioner-appellant's contentions;

and for such other and further relief as may be proper in the premises.

/s/ JOHN P. WEATHERWAX

Sworn to before me this
25th day of April, 1962.

ROSE M. TEMPLE
Notary Public, State of New York
Residing in Rensselaer County
Commission expires March 30, 1963

Court of Appeals Order Denying Motion to Amend Remittitur

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Tenth day of May A. D. 1962.

Present,

HON. CHARLES S. DESMOND, *Chief Judge, presiding.*

No. 385

In the Matter of the Application

of

DR. DAVID WASSERMANN,

Appellant,

For an Order, etc.,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondent.

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

A copy

GEARON KIMBALL,
Deputy Clerk.

Appellate Division Order Adopting Remittitur

At a Term of the Supreme Court, Appellate Division, Third Judicial Department of the State of New York, held in and for the Third Department at the County Court House in the City of Albany, New York, commencing on the 30th day of April, 1962.

Present:

Hon. Francis Bergan,
Presiding Justice,
Hon. William H. Coon,
Hon. J. Clarence Herlihy,
Hon. James Gibson,
Hon. Walter B. Reynolds,
Hon. Donald S. Taylor,
Associate Justices.

In the Matter of the Application

of

Dr. David Wassermann,
Petitioner-Appellant.

For an Order pursuant to Article 78 of the Civil Practice Act,

against

The Board of Regents of the University of the State of New York,
Respondent-Respondent.

The petitioner, above named, having appealed to the Court of Appeals of the State of New York by permission

of that Court, pursuant to the provisions of Section 589 of the Civil Practice Act, from an order of this Court which unanimously affirmed the final determination of the Board of Regents of the State of New York under review in this proceeding which ordered the revocation of petitioner's license to practice medicine in this State, and the matter having duly come on to be heard in the said Court of Appeals, and that Court, after hearing the cause argued by John P. Weatherwax (F. Walter Bliss, Esq., of counsel) and by Louis J. Lefkowitz, Attorney General of the State of New York (Robert W. Bush, Assistant Attorney General, of counsel) attorney for the respondent, having on April 5, 1962 ordered and adjudged that the aforesaid order of the Appellate Division of the Supreme Court, Third Judicial Department, appealed from be unanimously affirmed, without costs; and it was also further ordered by the said Court of Appeals, that the record aforesaid, and the proceedings in that Court be remitted to the Appellate Division of the Supreme Court, Third Judicial Department, there to be proceeded upon according to law;

And petitioner thereafter having moved in said Court of Appeals to amend the remittitur herein by adding thereto the following:

> "Upon the appeal herein there was presented to and necessarily passed upon by this Court questions under the Constitution of the United States, viz.: the petitioner-appellant's contention that his rights to due process of law under the Fifth and Fourteenth Amendments of the Constitution of the United States were denied to him and that he is being deprived of his rights to practice medicine in the State of New York in violation thereof. That the Court of Appeals held herein that petitioner-appellant was not denied his constitutional rights and that there was no merit to petitioner-appellant's contentions,"

and such motion having been opposed, and after due deliberation having been made thereon, petitioner's motion was denied by the Court of Appeals on the 10th day of May, 1962.

Now, upon reading and filing the remittitur of the Court of Appeals dated the 5th day of April, 1962, and on motion of Louis J. Lefkowitz, Attorney General, attorney for the respondent, it is

ORDERED, that the order, decision and judgment of the Court of Appeals be and the same hereby are in all respects made the order, decision and judgment of this Court.

/s/ JOHN J. O'BRIEN,
Clerk.

ENTERED: May 16, 1962.

A true copy.
John J. O'Brien,
Clerk.

Contemporary Newspaper Articles

(PHOTOSTAT)

(See opposite page ☛)

WALL ST. CLOSING
COMPLETE TABLES

NEW YORK Journal American

No. 26,899—DAILY FRIDAY, JANUARY 12, 1962 10 CENTS

7TH SPORTS
RACING
☆☆☆☆☆☆☆
SPORTS COMPLETE

Bare Bill Padding by MDs

Insurance Firms Are Victimized

By WALTER BAZAR

Charges of bill-padding and other fraudulent practices by doctors are pouring into the State Board of Regents "by the hundreds," the N. Y. Journal-American learned today.

Many of the physicians were said to be in New York City.

The district attorneys in all five boroughs are investigating at least 900 complaints.

Many of complaints were turned over to authorities by the Journal-American as a result of its tow-car racket investigation.

The data was given to August J. Bardo Jr., director of the Division of Professional Conduct, at 2 W. 45th st.

The padding of bills enabled doctors to collect much greater amounts than they were normally entitled to from insurance companies.

Information on complaints coming in by the "hundreds" originated with Walter R. King, special assistant to Education Commissioner James E. Allen Jr.

The Board of Regents, which has disciplinary powers over doctors and other professionals, is part of the State Education Department.

From his Albany office, Mr. King told the Journal-American

Federal government in November.

NEW YORK MIRROR, SATURDAY, DECEMBER 31, 1960

tion in Color — Pictures an

Prize Today a Whopping

Accuse MDs Of Insurance Fraud Plots

A widespread investigation of doctors throughout the state who may be involved in a giant racket to defraud insurance companies was disclosed yesterday by an official of the Board of Regents.

The head of the board's Division of Professional Conduct, August J. Bardo, said that 81 doctors in Brooklyn alone will be investigated.

Calling for "more rigorous and effective" disciplinary action in cases involving "ambulance chasing," Bardo said lawyers, doctors and insurance adjustors conspired to defraud insurance companies of millions of dollars.

BARDO said the licenses of two doctors here already have been taken up by the Regents Board, which administers the licensing of all professions except law.

He said Dr. John A. Shaw, of 610 Sheffield Ave., Brooklyn, and Dr. David Wasserman, of 285 West End Ave., had been obliged to surrender their licenses.

Bardo said investigators are probing "many cases" in Manhattan, and in the Bronx, Queens, Nassau and Suffolk counties.

Saying "it is antipated investigations will be conducted in Up-[illegible] be cases running into the hundreds."

THE REGENTS BOARD, which seeks an additional $100,000 appropriation for its investigative staff, asserted that in many situations lawyers sent clients to doctors who made false diagnoses, rendered inflated bills and charged for office visits that were never made.

The probe into ethical behavior of doctors is the result of an inquiry into phony insurance claims by the Appellate Division and the Brooklyn District Attorney's office.

Lawyers excepted, the Regents Board has the power to revoke licenses and discipline professional persons throughout the state.

Offshore Holiday

TOKYO, Dec. 30 (AP).—Radio Peiping said today Red China's batteries opposite Quemoy and Matsu islands have been ordered to hold their fire tomorrow and Sunday so the Nationalist Chi-

NEW YORK Journal American

No. 26,900—DAILY SATURDAY, JANUARY 13, 1962 10 CENTS

State Probes 'Bill Kiting' by Doctors Here

Albany, Jan. 12 (UPI).—The State Board of Regents said today it was investigating complaints of alleged "bill kiting" in accident cases by some 1,300 New York City doctors and den-

1,500 City MDs Face State Probe In Fraud Cases

At least 1,500 New York City doctors face investigation—and possible disciplinary or criminal action—on charges of bill-padding insurance claims or other fraudulent practices.

This was disclosed today by August J. Bardo, director of [illegible] $10,000,000-a-year tow-car scandal. They were turned over

Ac[illegible] New[illegible] Sli[illegible]

HUA[illegible] (UPI).—[illegible] ties to[illegible] mediat[illegible] resider[illegible] Canyo[illegible]

[illegible] then killed himself, [illegible]ndition. D'Alesio was [illegible]en he committed sui[illegible] Pe Darlene.

State Probes 'Bill Kiting' by Doctors Here

Albany, Jan. 12 (UPI) — The State Board of Regents said today it was investigating complaints of alleged "bill kiting" in accident cases by some 1,300 New York City doctors and dentists.

(August J. Bardo, director of the regents' professional conduct division, said that, in all, complaints of fee padding and other unethical conduct were received against more than 1,500 metropolitan area physicians.

Multiplied Fee by 40

(He said some of the complaints accuse doctors of charging as much as 40 times more for a service than normally would be asked, the Associated Press reported. Others claim physicians charged individuals for services never actually given, such as X-rays.

(Bardo said the complaints came from insurance firms, the offices of New York district attorneys and individual patients.)

Started in Brooklyn

A spokesman for the board said the cases were the outgrowth of an investigation that began in Brooklyn several years ago and spilled over into Queens and Bronx Counties.

The spokesman said the alleged bill kiting definitely was organized, but added it was impossible to tell if one group or a number of separate ones were involved. He said a small number of lawyers also was involved, and that their activities were being investigated by the Court of Appeals.

The Board of Regents licenses and polices all professions except law in New York State.

The spokesman said at least three doctors had lost their licenses within the last six months.

1,500 City MDs Face State Probe In Fraud Cases

At least 1,500 New York City doctors face investigation—and possible disciplinary or criminal action—on charges of bill-padding insurance claims or other fraudulent practices.

This was disclosed today by August J. Bardo, director of the Division of Professional Conduct of the State Dept. of Education, who said that about 30 physicians already had been found guilty of misconduct.

"About 14 had their licenses revoked by the Board of Regents," he said.

Mr. Bardo revealed that about 40 hearings are now in progress and 8,000 suspicious accident insurance claims are still to be checked.

SPOTLIGHTED BY J-A

Numerous complaints were received by the N. Y. Journal-American after its exposure of the phony accident claim racket in connection with the investigation into the city's $10,000,000-a-year tow-car scandal. They were turned over to authorities.

Mr. Bardo said the majority of cases involved claims against insurance carriers in negligence cases—many of them connected with auto accidents.

"They include exaggerated medical reports, exaggerated reports on the number of visits for treatment, and X-ray charges where there never were X-rays," Mr. Bardo said.

State Att. Gen. Louis J. Lefkowitz said four doctors already have been indicted and cases against 16 others have been completed or are pending before the medical grievance committee of the State Board of Regents.

...d then killed himself, ...ssidian, D'Alesio was ...on he committed suicide by Darlene. (UPI TELEphoto)

...ties to... ...mediat... ...resident... Canyon... ...already... a repe... disastr...

Offic... duced t... masses... the sig... arcana... Peruvia...

...day ...ry good "Tru... At or...spreaded ... danger."more. He tol... ...ions of ...know who ... I know. He ... in a di... ...he slipped ... lake w... ...spy for G-2, ... than an... for prote...

low-co...

Pizarro got other... watchers...onately held ...and are will return... Cuba.

"When we get back," ... "there will be no place ... to run."

She told about the ... of Eddy.

"I was talking to ... phone. Love talk. It ... o'clock in the morning. ... come for him. He ... 'Chubro!' before the ... dead, and I got rid of ... photos and all ... letters.

"Two hours later ...

Continued ...

ARM-BOOSTED MEN ON MUNICIPAL RELIEF

...ills will be asked to volunteer for street cleaning following snow and windstorms, the Bayonne, N. J., Borough Council decided today.

Say Gizenga Deserted Job

LEOPOLDVILLE, The Congo, Jan. 12 (AP).—A formal censure motion against Lumumbist Antoine Gizenga was introduced in the Congolese parliament today, charging him with deserting his official functions in Leopoldville and defying the parliament. He holds rank as deputy premier in the Leopoldville central government.

In Stanleyville, Gizenga is reported openly at odds with his one-time army supporter, Gen. Victor Lundula. Reliable reports said Lundula's troops have arrested four of Gizenga's top lieutenants.

Today's tough parliamentary move was backed by 44 members of the lower house of deputies, including many of Gizenga's one-time supporters.

...Dec. 30. — Blonde ...lady Ljuris is only ... has lived a lifetime, ...ears she became a ... In less than that ... a freedom fighter, ... better circumstances ... of her 200,000 coun... ...e. Hedy lives in a ... ...stow on N. W. 36th ... of lawyers also was involved, and her father, Julio, ...uthy businessman, ... other, Hayden. But ...

TEARS SPILLED from Hedy's big blue eyes as she told how Eddy Suarez Rivas, the one "I love forever," was jailed through the perfidy of a "friend" and she was stripped of her clothes on a Havana street.

"Eddy and I were in the MRR (Movement for Revolutionary Recovery) together," she said. "That is a violently anti-Communist organization that is alive and growing in Cuba.

"We were passing out guns ...boy friend; only bitter memories, and hope.

...$360 to him, but he added "Julie" gave back $65 of the money.

TODAY'S INDEX

Backwash	19	Jack O'Brien	12
Bridge	30	Lonely Persons	17
Confused	40	Patterns	30
Comics	38, 39	Wardle's Pages	19
Bob Considine	19	Pat Doctor	23
Cross-Word	38	Robert Peterson	19
Editorial	18	Places to Dine	15
Financial	32, 33	Real Estate	34
Fishing	35	Records	19
Food, Cooking	11	Sport Set	10, 11
Radio Guide	22	Leon Sobel	19
Helena	11	C. Sokolsky	18
Horoscope	38	Sports	24 to 28
Eliquiles	15	Theatres	15 to 17
Kaltenborn	18	TV & Radio	12, 13
Dr. Kelser	11	Want Ads	35 to 37
Movie Clock	17	Walking Wall	40
Music	18	Your Answers	38
Obituaries	32		

Phone Your News and Photo Tips to COrtlandt 7-1212

...ACT... ...SECOND Off 1:48 ...$2 DOUBLE—... THIRD Off 1:39½ ...

Gridder Ask...

BALTIMORE, Jan. 12 (UP...—Halfback Lenny Moore of ... Baltimore Colts has filed ... claims with the Workm... Compensation Commission ... leging permanent disabilities ... was learned today.

H. Morton Bacon, Mr. Moore's attorney, explained that "football player is no different than a person working ...

...f Hav...

DAILY NEWS, SATURDAY, DECEMBER 31, 1960

State Fingers 80 Doctors in Insurance Gyp

By HENRY MACHIRELLA

A Board of Regents crackdown on doctors who reportedly conspired with lawyers and insurance adjustors to defraud insurance companies of millions of dollars has already involved 80 Brooklyn doctors and may eventually affect hundreds more throughout the state.

Indicating a stepup of the probe into ambulance-chasing by the medics, August J. Bardo, director of the board's division of professional conduct, said yesterday he is asking an additional $100,000 for the mushrooming investigation.

Bardo said 20 of the Brooklyn cases are in various stages of completion while 60 remain to be processed. Still ahead are investigations of the massive racket in the Bronx, Manhattan, Queens, Nassau and Suffolk Counties.

Two Lose Licenses

The board not only supervises the state's educational system but also issues and revokes doctors' licenses.

The board has already revoked the licenses of two physicians and has started action against a third. Bardo said the probe involves "men of very substantial practice and of recognized standing and many are high in hospital circles."

The board's crackdown stems from an investigation of phony insurance claims conducted by the Appellate Division and the rackets bureau of the Brooklyn district attorney's office.

Docs Never Saw Claimants

The probe revealed that lawyers sent clients in accident cases to doctor accomplices. Bardo said the docs hiked their bills, made phony diagnoses and charged for office visits that were never made.

In some cases, he added, the doctors never saw the clients at all, merely turning over their office stationery to the lawyers.

The two medics who lost their licenses were Dr. John A. Shaw of 610 Sheffield Ave., Brooklyn, and Dr. David Wasserman of 280 West End Ave. Both have appealed the revocations to the Supreme Court.

Action against the racketeering lawyers has resulted in 10 disbarments, six resignations from the bar, six suspensions and nine censure.

THE REGENTS BOARD which seeks an additional $100,000 appropriation for its investigative staff asserted that in many situations lawyers sent clients to doctors who made false diagnoses, rendered inflated bills and charged for office visits that were never made.

The probe into ethical behavior of doctors is the result of an inquiry into phony insurance claims by the Appellate Division and the Brooklyn District Attorney's office.

Lawyers excepted, the Regents Board has the power to revoke licenses and discipline professional persons throughout the state.

Offshore Holiday

TOKYO, Dec. 30 (AP) — Radio Peiping said today Red China's batteries opposite Quemoy and Matsu islands have been ordered to hold their fire tomorrow and Sunday so the Nationalist Chinese defenders can spend "a calm and happy New Year."

...the Journal-American as a result of its tow-car racket investigation.

"The data was given to August J. Bardo Jr., director of the Division of Professional Conduct, at 2 W. 45th st.

"The padding of bills enabled doctors to collect vastly greater amounts than they were normally entitled to from insurance companies.

Information on complaints coming in by the "hundreds" originated with Walter R. King, special assistant to Education Commissioner James E. Allen Jr.

"The Board of Regents, which has disciplinary powers over doctors and other professionals, is part of the State Education Department.

From his Albany office, Mr. King told the Journal-American:

"We've never had so many complaints before. We're getting them by the hundreds. They all involve automobile accident cases.

"It is an outgrowth of the investigation started a few years ago by the Brooklyn District Attorney's office.

"It has ballooned all out of proportion."

WIDESPREAD IN BRONX

Recently, the spokesman said, the investigation spilled over to the District Attorneys' offices in Bronx, Queens Manhattan and Staten Island.

It was especially widespread in the Bronx and Queens, he stated.

"As much as perhaps 90 per cent of the complaints have come from New York City's district attorneys," he added.

"The amount of complaints is not unmanageable yet, but we think we'll have to add more people to our New York office to handle the situation."

Her referred to Mr. Bardo's office.

The spokesman added:

"I haven't any figure as to the exact number of complaints. But last week when the board held a meeting to decide how to handle the volume, we expected well over 1,000. We haven't yet counted them.

"It appears that all, or almost all, of them deal with fraudulent bills submitted for insurance claims."

THE WEATHER

...Increasing cloudiness late this afternoon and tonight; low tonight around 20. Tomorrow, partly cloudy, high in 30s.

...Tonight 26. Humidity 35. Barometer 30.15 inches, falling.

HOURLY TEMPERATURES

8 a.m.	27	1 p.m.	31
9 a.m.	27	2 p.m.	31
10 a.m.	28	3 p.m.	31
11 a.m.	29	4 p.m.	31

(Details on Page 19)

THE READER'S CHOICE

The Journal-American Has the Greatest Circulation in the Evening Field

...CABE said up a year-ed upon a sixth floor 9 the street which is a zone in the

...WIN DAY!

...Story and Page 7

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 20 196
JOHN F. DAVIS, CLERK

(1187)

Supreme Court of the United States

No. 227—October Term, 1962

DAVID WASSERMANN,

Petitioner,

against

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT

RESPONDENT'S BRIEF

LOUIS J. LEFKOWITZ,
Attorney General of the State
of New York,
Attorney for Respondent.

PAXTON BLAIR,
Solicitor General,

ROBERT W. BUSH,
Assistant Attorney General,
of Counsel.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

Supreme Court of the United States

No. 227—October Term, 1962

DAVID WASSERMANN,

Petitioner,

against

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF

The case involves the trial of a doctor of medicine before an administrative tribunal on charges of unprofessional conduct. The charges were deemed established by the unanimous decision of both the Appellate Division (13 App. Div. 2d 591), and the Court of Appeals (11 N. Y. 2d 173, 182 N. E. 2d 264), and the revocation of petitioner's license to practice medicine stands affirmed.

Procedure and Determinations Under N. Y. Education Law

Education Law, § 6514, subd. 2(a) provides that a doctor may be deprived of his license if, after a hearing, he is found "guilty of fraud or deceit in the practice of medicine". The trial is had before the Medical Grievance Committee of the Regents (*id.*, § 6515) and is reviewable by the Regents Committee on Discipline (*id.*, § 211). The deci-

sions of each of these Committees were unanimous. The former Committee consists of ten doctors whose vote, to bring about the revocation of a license must be unanimous. In the instant case there was one vacancy caused by death (App., p. 14a), but the New York Court of Appeals stated that when 9 out of 9 of the Committee who heard the case all voted for revocation the requirements of unanimity were met (App., p. 6a).

The Medical Grievance Committee handed in its Report (App., p. 10a) to the Regents, whose Committee on Discipline in turn reported to the Regents its agreement with the determination of the Committee on Grievances, as the Committee on Discipline was required to do under Education Law, § 211. Whereupon, the Regents adopted its Committee's Report (App., p. 9a).

The Petitioner's Offense

The petitioner was charged with fraud and deceit in the practice of medicine under Education Law § 6514, subd. 2(a) in that he submitted to an attorney (since disbarred: see *Matter of Silver* v. *Miller*, 13 App. Div. 2d 974 [2nd Dept., 1961]) false medical reports and false bills to assist the attorney in securing more favorable settlements in actions for personal injuries (R., 8). He was also charged with unprofessional conduct (R., 11).

Holding of Courts Below

The charges were held to have been proved by both Courts below. As to the former charge, the Court of Appeals said (App., p. 3a):

> "Nothing in the statute limits discipline for fraudulent diagnoses to cases where the fraud is perpetrated directly on the patient. Indeed, insurance companies

are frequently the ultimate payers of medical bills in personal injury cases, and in this respect are just as much entitled to true medical reports and bills as are the patients. Appellant's fraudulent scheme, of course, was dependent upon misuse of his medical license, and the submission of false reports and bills to interested persons was an integral part of his medical practice. The preparation of medical reports for various purposes has always been regarded as a necessary part of medical practice, and it makes no difference whether false reports are submitted directly to the patient, attorney, or the insurance company on behalf of the patient. The statute authorizes discipline in any event.

Submissions of false reports of various types to interested persons or institutions other than the patient himself have been found to constitute 'fraud or deceit in the practice of medicine' in numerous cases." (citing cases).

As to the latter charge, the Court said (App., p. 5a):

"Appellant's participation was *malum in se* and undoubtedly amounted to 'unprofessional conduct' under the standards commonly accepted by physicians in this State (*Matter of Cherry* v. *Board of Regents*, 289 N. Y. 148, 158-161; *Matter of Bell* v. *Board of Regents*, 295 N. Y. 101).

Moreover, the acts were so obviously wrong and violative of the standard of ethics expected of a physician that they constituted 'unprofessional conduct' even in the absence of regulations defining the term (*Matter of Bell* v. *Board of Regents*, *supra*)."

The Trial

The Record on Review filed in the Court of Appeals of New York sets forth the minutes in full. The appearances are noted at R. 37, and the testimony of the witnesses for the Regents is set forth at R. 54-129. Ample opportunities to cross examine were afforded to petitioner's coun-

sel, Mr. Dawson. See *e.g.*, R. 64, 75, 81, 84-86, 94-101, 106-107. Doctor Wassermann took the stand in his own behalf at R. 134-155. He was cross-examined at R. 155-176.

While certain patients of the Doctor were not called (R. 129-130), yet the statute (Education Law, § 6515, subd. 5) provides:

> "The committee on grievances shall not be bound by the laws of evidence in the conduct of its proceedings, but the determination shall be founded upon sufficient legal evidence to sustain the same."

We submit that the allegations in the petition filed in this Court to the effect that the trial was not fair are baseless.

The Attack on the Statutes

(1)

The assertion (Pet., p. 29) that a 1953 statute (N. Y. L. 1953, ch. 682) was applied retroactively against petitioner and thus violated the constitutional provisions against *ex post facto* laws is absurd for two reasons: (1) we are dealing with a civil, not a criminal statute; and (2) some of the petitioner's acts continued well into 1956, as the Court below found (App., p. 5a).

(2)

The petitioner assails the impartiality of the administrative tribunal before which his trial on charges took place. This raises no federal question.

It has long been recognized that when the conformity of the conduct of a member of a learned profession with the traditional standards of that profession is under challenge, it is proper to have the man tried before a tribunal

consisting of members of that profession. This procedure received the approval of this Court in *Barsky* v. *Board of Regents*, 347 U. S. 442 (1954), which involved the same procedural provisions of the Education Law as are involved in the instant case. This Court held (pp. 452-453) that the provisions met the requirements of due process.

It has generally been recognized that members of a particular profession may properly be made the judges of the qualifications of an applicant for admission. *People* v. *Griswold*, 213 N. Y. 92 (1914); *Ex parte Gerino*, 143 Cal. 412, 77 Pac. 166 (1904); *Spencer* v. *Hunt*, 109 Fla. 248, 147 So. 282 (1933). And see JAFFE, *Law Making by Private Groups*, 51 Harv. L. Rev. 201, 249 (1937); Case-note: *Delegation of Governmental Power to Private Groups*, 32 Col. L. Rev. 80 (Jan., 1932). And when the right of a member of one of the learned professions—whether the field be law, or medicine, or theology—to continue to *remain* in the profession is under challenge by reason of some matter of personal conduct, the member by immemorial custom is tried before a tribunal consisting of members of that profession.

We submit that it is not necessary to spell out what constitutes unprofessional conduct; and that in any event the Court of Appeals was fully warranted in using the language quoted above from App., p. 5a.

The term "unprofessional conduct" is not to be deemed void for vagueness simply because the term is not defined in detail or with precision. We submit that it is a term of which a man who has (as has the petitioner) been a doctor ever since 1937 may be assumed to possess an adequate comprehension. *Matter of Bell* v. *Board of Regents*, 295 N. Y. 101, 110 (1945). Since, in areas involving ad-

ministrative detail and complexity, there is need for "practicality and flexibility in laying down standards" (*Matter of Old Republic Ins. Co. v. Wikler*, 9 N. Y. 2d 524, 532-533 [1961]), we submit that "unprofessional conduct" need not be defined in detail or by example. This Court long ago expressed similar views in a disbarment case. *Ex parte Secombe*, 19 How. 9, 14 (1856).

The Petition For Certiorari Should Be Denied

July 17, 1962.

Respectfully submitted,

Louis J. Lefkowitz,
Attorney General of the State
of New York,
Attorney for Respondent,
The Capitol,
Albany 1, New York.

Paxton Blair,
Solicitor General,

Robert W. Bush,
Assistant Attorney General,
of Counsel.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 27 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

No. 227

DAVID WASSERMANN,

Petitioner,

against

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF

JACOB RASSNER,
Attorney for Petitioner,
15 Park Row,
New York 38, N. Y.

INDEX

Cases Cited

	PAGE
Barsky v. Board of Regents, 347 U. S. 442, 74 S. Ct. 650	2, 3
Cherry v. Board of Regents, 289 N. Y. 148 at page 154	2
Consolidated Edison v. N.L.R.B., 305 U. S. 197, 229-230, 59 S. Ct. 206, 217	1
Cosmopolitan v. Feuchtwanger, 226 N. Y. S. 2d 584, 592	1
Cummings v. The State of Missouri, 71 U. S. 277	3
Ex parte Secombe, 19 How. 914	2
Gardner v. Ginther, 250 N. Y. S. 176, 182, 232 A. D. 296 aff'd 257 N. Y. 578, per cur.	2, 3
Hilfer v. Board of Regents, 283 N. Y. 304, 307-309	2, 3
In re Donegan, 282 N. Y. 285	3
Lloyd, etc. v. Elting, 287 U. S. 329, 339-340, 53 S. Ct. 167, 172	3
Mooney v. Holohan, 294 U. S. 103, 112, 55 S. Ct. 340, 341, 342	3
Stromberg v. California, 282 U. S. 359, 368, 51 S. Ct. 532, 535	3
Sung v. McGrath, 339 U. S. 33, 50, 70 S. Ct. 445, 454	2
U. S. v. Zimmerman, 94 F. S. 22, 25	3
Williams v. N. Carolina, 317 U. S. 287, 292, 63 S. Ct. 207, 210	3

IN THE

Supreme Court of the United States

October Term, 1962

No. 227

DAVID WASSERMANN,

Petitioner,

against

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF

It is fitting and proper to petition this Honorable Court for protection against a conviction by a tribunal, created by the accusers, wherein the accusers preside as judge and jury; at which hearing the accuser is the prosecutor in a proceeding where probative facts are not established and *ex post facto* law, enunciated by the accusers, asserted as constituting legal sufficiency for sustaining charges on the basis of suspicion and hearsay comments. *Consolidated Edison* v. *N.L.R.B.*, 305 U. S. 197, 229-230, 59 S. Ct. 206, 217:

> "* * * But the assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence." (pp. 229-230 of 305 U. S.; p. 217 of 59 S. Ct.)

See also *Cosmopolitan* v. *Feuchtwanger*, 226 N. Y. S. 2d 584, 592 (Pet., Point V, p. 29):

> "When the constitution requires a hearing, it requires a fair one, one before a tribunal which meets

at least currently prevailing standards of impartiality."

Sung v. *McGrath*, 339 U. S. 33, 50, 70 S. Ct. 445, 454.

See also, *Hilfer* v. *Board of Regents*, 283 N. Y. 304, 307-309.

It is not absurd to plead to this Court, to inquire into the unrestrained power of a lay tribunal to create a forum, in an atmosphere of hysteria, when the professional lives of some 1,500 doctors [1] in one city, New York, are in jeopardy on the basis of *ex post facto* law, suspicion and hearsay evidence. *Gardner* v. *Ginther*, 250 N. Y. S. 176, 182, 232 A. D. 296, aff'd 257 N. Y. 578, per cur.

Respondent cites an 1856 [2] decision in support of its procedure and alleges that custom justifies this action. Such argument is entitled to the same respect as a statement that it was the custom, about that time, to burn women at the stake on the basis of accusation of witchcraft. See *Gardner* v. *Ginther, supra.*

Respondent cites the *Barsky* case [3] wherein a convicted criminal had his license to practice medicine suspended. This hardly justifies the exercise of dictatorial power enabling accusers to legislate, after the event, and to place in jeopardy of destruction, years of study and public service of professional men.

Perhaps the time has arrived to review the entire holding in the *Barsky* case, *supra.* See also *Cherry* v. *Board of Regents*, 289 N. Y. 148 at page 154, opinion by Judge Lehman.

---

[1] See Appendix to Petition, page 61a, contemporary newspaper articles (photostats), New York Journal American, Saturday, January 13, 1962.

[2] *Ex Parte Secombe*, 19 How. 914.

[3] *Barsky* v. *Board of Regents*, 347 U. S. 442, 74 S. Ct. 650.

See the dissenting opinion by Mr. Justice Black concurred in by Justices Frankfurter and Douglas.[4]

The other citations by respondent seem to justify the slang expression "respondent is out in left field."

These cases treat with lay people: (a) practicing a profession without a license (b) conduct by private companies; absolutely nothing to do with a licensed practicing doctor.

When penal measures are imposed on the basis of *ex post facto* law, it is not absurd to complain that constitutional rights have been violated. *Cummings* v. *The State of Missouri*, 71 U. S. 277; *In re Donegan*, 282 N. Y. 285; *Gardner* v. *Ginther*, *supra*.

The privilege of inquiry into hearsay matters, does not constitute a license for a conviction without proof and the use of a false exhibit[5] is bad enough in itself.

The use of this exhibit was clearly in violation of law. *Mooney* v. *Holohan*, 294 U. S. 103, 112, 55 S. Ct. 340, 341, 342; *U. S.* v. *Zimmerman*, 94 F. S. 22, 25; *Lloyd, etc.* v. *Elting*, 287 U. S. 329, 339-340, 53 S. Ct. 167, 172.

The committee which found petitioner guilty was improperly constituted.

Factually, it was constituted in violation of law as laid down in the case of *Hilfer* v. *Board of Regents*, *supra*.

If one ground of conviction is invalid on constitutional grounds, the judgment cannot be sustained. *Williams* v. *N. Carolina*, 317 U. S. 287, 292, 63 S. Ct. 207, 210; *Stromberg* v. *California*, 282 U. S. 339, 368, 51 S. Ct. 532, 535.

---

[4] *Barsky* v. *Board of Regents*, *supra*, at 347 U. S. pages 459, 461.

[5] See letter of Attorney General of the State of New York, dated February 10, 1961, addressed to Honorable Francis Bergan, Presiding Justice of the Appellate Division, 3rd Dept., set forth in the footnote of page 5 of the petition.

This matter is of grave importance not only to petitioner, but to all professional people whose licenses may be in jeopardy upon the basis of an *ex post facto* law applied in a forum not only friendly to the accusers, but which forum itself is also the prosecutor, judge and jury, and without restraint by rules of evidence which obtain in a Court of law. When to all of this is added the use of a false exhibit—an exhibit withdrawn from a lower Court upon the plea that its use was error, but which exhibit is presented in argument to the Appellate Court, the procedure is not only unlawful, but immoral.

A matter such as this is of substantial public concern and the procedures used by the State of New York in this case should be reviewed by this Court.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioner.